Supreme Court, U.S.
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No. 08-719

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IN THE

Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC.,

Petitioner,

—v.—

ASBESTOSIS CLAIMANTS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD H. BROWN, JR.
Counsel of Record

Of Counsel to
NOURSE & BOWLES, LLP
One Exchange Plaza
55 Broadway
New York, New York 10006
(212) 952-6200

Attorneys for Petitioner American Steamship Owners Mutual Protection and Indemnity Association, Inc.

QUESTIONS PRESENTED

1. Did the Second Circuit Court of Appeals, in reversing the decision of the district court which had affirmed the bankruptcy court, err in denying petitioner marine indemnity insurer ("American Club" or "Club") the proper full exercise of its judicially granted right of setoff under federal bankruptcy law, in conflict with relevant decisions of this Court?

2. In reaching its decision, did the Second Circuit, by—

(a) failing to state or apply any legal rule applicable to interpreting reorganization plan provisions,

(b) without analyzing or accurately stating bankruptcy plan § 4.05.07(a)(iv), wrongly asserting that it "authorized that any setoff owed by Prudential to an insurer be shared ratably among the Claimants and subtracted from each Claimant's individual recovery in much the same way as the deductibles . . . ," in such a way as to deny petitioner Club exercise of its adjudicated setoff right fully against the Trust when in fact subsection (iv) authorized nothing of the kind, but instead *mandated* that there be a ratable sharing among all affected claimants of *a claim against the offset amount*, i.e., the total amount previously offset by the Club; and

(c) in "quoting" that plan provision, excising certain words and adding others in

brackets, thus rewriting, distorting and concealing its actual language and true meaning, in such a way as to lend spurious credence to its wrong assertion of what plan § 4.05.07(a)(iv) "authorized",

so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Appellee and Petitioner: American Steamship Owners Mutual Protection & Indemnity Association, Inc., a non-profit, assessable mutual indemnity insurance association of shipowners, based in New York, New York.

Appellants and Respondents: Asbestosis Claimants, unnamed seamen who allegedly were employees of Debtor Prudential Lines, Inc. and are represented by the Maritime Asbestosis Legal Clinic of Detroit, Michigan.

RULE 29(6) STATEMENT

American Steamship Owners Mutual Protection and Indemnity Association, Inc., a private non-governmental party, certifies that the following are corporate parents of said party, and any publicly held corporation that owns 10% or more of its stock: NONE

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(B) WITHOUT ANALYZING OR ACCURATELY STATING REORGANIZATION PLAN §4.05.07(a)(iv), WRONGLY ASSERTED THAT IT "AUTHORIZED THAT ANY SETOFF OWED BY PRUDENTIAL TO AN INSURER BE SHARED RATABLY AMONG THE CLAIMANTS AND SUBTRACTED FROM EACH CLAIMANT'S INDIVIDUAL RECOVERY IN MUCH THE SAME WAY AS DEDUCTIBLES . . . ." IN SUCH A WAY AS TO DENY THE CLUB EXERCISE OF ITS ADJUDICATED SETOFF RIGHT FULLY AGAINST THE TRUST, WHEN IN FACT THAT SUBSECTION (iv) AUTHORIZED NOTHING OF THE KIND BUT INSTEAD MANDATED THAT THERE BE A RATABLE SHARING AMONG ALL AFFECTED CLAIMANTS OF A CLAIM AGAINST THE OFFSET AMOUNT, I.E., THE TOTAL

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(C) IN "QUOTING" THAT PLAN PROVISION, EXCISED CERTAIN WORDS AND ADDED OTHERS IN BRACKETS, THEREBY REWRITING, DISTORTING AND CONCEALING ITS ACTUAL LANGUAGE AND TRUE MEANING, MISLEADINGLY LENDING SPURIOUS CREDENCE TO ITS WRONG ASSERTION OF WHAT PLAN 4.05.07(a)(iv) "AUTHORIZED"..... 20

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The Second Circuit reversed the Memorandum and Order of the United States District Court for the Southern District of New York decided on September 21, 2005, reported at 2005 U.S. Dist. LEXIS 20657 (S.D.N.Y. 2005) (App. B, 24a - 31a), which had affirmed the Memorandum Decision and Order of the United States Bankruptcy Court for the Southern District of New York dated January 19, 2004 [*sic*, 2005], not reported (App. C, 32a - 55a), denying a joint motion of Prudential Lines, Inc., ("PLI") Disbursement Trustee ("Trustee") and the Maritime Asbestosis Legal Clinic ("MALC"), on behalf of the Asbestosis Claimants, in PLI's Chapter 11 bankruptcy case. The joint motion sought approval of a proposal for payment of claims which Second Circuit has referred to as the "Proposed Payment Structure" ("PPS") (App. A, 3a, and which is described in App. A, 7a-9a).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Second Circuit's opinion was rendered on June 19, 2008. A timely petition for panel rehearing and petition for rehearing *en banc*, filed on July 7, 2008, was denied on September 2, 2008, without opinion. (App. D, 56a-57a).

STATUTORY PROVISION INVOLVED

This case involves 11 U.S.C. § 553, which provides in relevant part:

§ Setoff.

> (a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that—
>
> [Exceptions omitted as inapplicable.]

STATEMENT OF THE CASE

PLI or a predecessor was the owner of American flag merchant ships for many years. American Club annually issued assessable protection and indemnity insurance ("P&I") policies to PLI

from 1940 through 1970 and from 1975 through early 1986. PLI belonged to another P&I club from 1971 through 1974. As material here, the policies provided:

> [American Club] . . . DOES INSURE ____ (Herein called collectively the Assured) . . . IN THE INSURED SUM OF ____ DOLLARS [for a specific year] against the risks and subject to the terms and conditions hereunder set forth in respect of the named vessel . . .
>
> THE [AMERICAN CLUB] AGREES TO INDEMNIFY THE ASSURED AGAINST ANY LOSS, DAMAGE OR EXPENSE WHICH THE ASSURED SHALL BECOME LIABLE TO PAY AND SHALL PAY BY REASON OF THE FACT THAT THE ASSURED IS THE OWNER . . . OF THE INSURED VESSEL AND WHICH SHALL RESULT FROM THE FOLLOWING LIABILITIES, . . . :
>
> [Liability for loss of life, personal injury, and illness, as well as liability for cargo loss or damage. The claims were subject to deductibles in various amounts.][1]

Thus the Club's obligation to indemnify for covered claims is predicated on two basic contractual requirements: (1) that the assured is "liable

[1] This sample is adapted and abbreviated from the sample used by the bankruptcy court in *In re Prudential Lines, Inc.*, 148 B.R. 730, 736-37, n.3 (Bkrtcy. S.D.N.Y. 1992) (App. H, 124a, at 130a), hereinafter "*Prudential I*". A sample assessable insurance policy issued by the American Club is included in the Appendices hereto. (App. L, 311a-345a).

to pay . . . by reason of the fact that . . . [it] is the owner of the insured vessel . . ." (the "liable to pay" requirement) and (2) that it "shall pay" the underlying claim (the "pay first" requirement).

In late 1986 creditors filed an involuntary petition against PLI under Bankruptcy Code Chapter 11, and on November 4, 1986, PLI filed consent to entry of an Order for Relief. A modified plan of reorganization ("Plan") (App. F, 60a-85a) was confirmed on October 4, 1990. Among other things, the Plan provided for reorganization funding, established the PLI Disbursement Trust ("Trust") and authorized it to "attempt" to liquidate claims and to enforce the Trust's interests under PLI's insurance policies.

Under the Plan, the Trust was provided with funds of only $500,000 made up of "Insurance Preservation and Claims Liquidation Funds" of $200,000 (Plan, App. F. at 65a) plus "Liman Funds" of $300,000. (App. F. at 65a) The Trust also received a "Litigation Funding Commitment" of possible additional funds (App. F. at 65a, see also the definition of "Available Cash", 61a) which funds apparently never materialized as today the Trust's total assets are less than $230,000.[2]

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[2] The American Club respectfully asks the Court to take judicial notice of the latest financial report submitted by the PLI Trustee available in PACER, 86-11773, United States Bankruptcy Court, Southern District of New York, filed on October 21, 2008, Docket No. 1287. The Trust has total assets of less than $230,000 including a "Liman" fund of $100,000 and the Trust has debts of over $575,000. According to the Trust's financial reports, the Liman fund is the only Trust asset which is unencumbered. Thus the only

Meanwhile the Trust faced "Deferred Priority Claims" (App. F. at 64a), "Deferred Administrative Claims", including the Trustee's annual salary of $107,000 (Supplemental Disclosure Statement, App. G at 98a, 106a, 111a), as well as substantial claims by the American Club for unpaid premiums and assessments. (App. G at 118a).

The Plan is lengthy and, as discussed in detail *infra*, Point II, included a specific provision with respect to ratable sharing among affected claimants of a claim against the total offset amount which the Club might obtain against indemnification claims the Trustee might present to the Club.

More broadly, the Plan included a lengthy section, 4.05.07 (App. F, 71a - 81a), entitled *Treatment of Certain Claimants*, which among other things provided that the Trustee "succeed to all insurance rights of PLI," . . . "*attempt* to secure . . . [such] insurance rights", including "steps as specified . reasonably *intended* to obtain the benefits of insurance . . . In particular . . . and *subject to the availability of funds for such purpose* (App. F at 73a)[3] and satisfactory assurances and documentation . . . Trustee is authorized to enter into arrangements . . ." whereby he ". . .

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funds available to pay claims total $100,000. Apparently, over the last 18 years since 1990, the Plan's provisions for litigation funding have not succeeded.

[3] In view of the Trust's dearth of funds, this is an important requirement which the PPS was designed to evade. Second Circuit does not mention it. More generally, the emphasized words and phrases indicate that the Plan was in large part a matter of "attempt" and "inten[tion]" and "subject to availability of funds," so was not foreordained to success.

pays the Allowed Insurance Claim in full in cash", the claimant repays "... the Deductible Claim [essentially, the amount of the deductible] and the Club ... reimburses the [Trustee] in cash for the full amount of the Excess Claim [i.e., in excess of the deductible] and the claimant is given an Allowed Claim in Class 5C in the amount of the Deductible Claim." (*See* Plan § 4.05.07(a)(i) (App. F, at 71a-74a), emphasis added.)

The Plan also limits the Trustee's potential liability to pay any claims. Article IV entitled *Treatment of Classes*, provides, as relevant:

> 4.05.03 *Class 5C.* Each holder of a Class 5C Claim, subject to §§ 5.01, 5.15, and 6.01c of this Plan, *shall* receive:
>
> * * *
>
> ii) *after payment in full of all Deferred Administrative Claims and all Deferred Priority Claims*, its Pro Rata share of a percentage (calculated in accordance with and subject to § 4.05.04(b) of the Plan) of any further distributions of Available Cash of the PLI Disbursement Trust.
>
> In addition, *subject to possible defenses to payment Clubs or other insurers may have*[4], holders of Insured Claims in Class 5C, including holders of Allowed Late-

[4] The qualifiers, "subject to possible defenses to payment Clubs ... may have ...", "may be" and "attempt", emphasize that the Club's defenses were preserved in the Plan and that the Plan was not certain of success.

> Filed Asbestos Claims, *may be* entitled to payment in cash of Excess Claims, directly or indirectly, from Clubs or other insurers. As set forth in § 4.05.07(a) of the Plan, $200,000 shall be set aside by the PLI Disbursement Trust in order to *attempt* to preserve insurance rights and to provide funds for the liquidation of Personal Injury Claims and Cargo Damage Claims and an additional $300,000 shall be set aside in Liman funds. . . .

Plan, App. F, 69a-70a (emphasis added). (Plan § 4.05.07(a)(ii) makes the same point (App. F at 74a-76a) and contains similar qualifiers.)

Thus, the Plan provided that, whatever the Trust's underlying theoretical liability for any claim, its "liability to pay" claims is limited to its "Available Cash" (defined in App. F, 61a) after payment of Deferred Administrative and Priority Claims, and no Claimant is entitled to receive more (nor is the Trust liable to pay more) than a Pro Rata share of that Available Cash. In any event, the Club's stipulated setoff of $1,270,980[5] far exceeds the Trust's present Available Cash (even *before* deducting payment of deferred Administrative Claims). Accordingly, on that score alone, as discussed further in Point I below, the Club can have no contractual obligation to indemnify the Trustee with cash in any amount.

In December 1990 the Trustee commenced an adversary proceeding against the Club seeking judgment on various aspects of the P&I policies.

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[5] In 1992, the amount of the Club's setoff was stipulated to be $1,270,980. *Prudential I*, 148 B.R. at 754. (App. H, 176a).

Asbestosis Claimants were permitted to intervene, and the Club also moved for judgment on its asserted setoff rights. On December 10, 1992, the bankruptcy court, in *Prudential I*, after a thorough discussion, held that "the Plan does not alter Club's contractual obligations as they exist under the P&I policies and applicable law." *Id.* at 748, App. H, 161a. The bankruptcy court also upheld the American Club's setoff rights, stating:

> 5. American Club may offset unpaid premiums and assessments against sums payable to Trustee under the provisions of triggered P&I policies. As stipulated by the parties, the amount of the setoff is $1,270,980. If American Club exercises this right to setoff, the Trust is entitled to the contractual benefits of the 1979, 1983, 1984, and 1985 policies.
>
> Partial summary judgment regarding this issue is granted in favor of American Club. American Club's motion for relief from the automatic stay will be set for a hearing, if necessary.

Id. at 754, App. H, 176a, and *see* the ensuing Judgment of the bankruptcy court formally granting the American Club's setoff right in the amount of $1,270,980. (App. I, 179a) None of the foregoing holdings or the judgment were appealed, and they are *res judicata*.

In March 2004, twelve years after *Prudential I*, and after further litigation concerning the rights and obligations of the parties[6] under (a) the

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[6] See, e.g., *In re Prudential Lines, Inc.*, 170 B.R. 222 (S.D.N.Y. 1994) (*Prudential II*) (App J, 181a) and *In re Pru-*

insurance policies, (b) the Plan, and (c) New York law, the Trust and MALC filed a joint motion seeking an Order from the Bankruptcy Court purportedly "to enforce" the Club's setoff rights (but actually calculated to cripple them) by seeking approval of what is now called the Proposed Payment Structure ("PPS").

The bankruptcy court's jurisdiction was predicated on 28 U.S.C. § 1334(b), the Standing Order of the United States District Court for the Southern District of New York, referring bankruptcy cases to the Bankruptcy Court, 148 B.R. 730, 734-35 n.1 (App. H, 125a) and the terms of the Plan. (App. C, 83a).

According to the Second Circuit (App. A, 7a-9a), under the PPS, essentially the Trustee would (1) pay each Allowed Claim (presumably in an amount agreed by the Club or ordered by the court) (2) each claimant would repay to the Trustee both the relevant deductible amount and his "pro-rata share" of the Club's [anticipated] setoff; (3) the Trustee would make an indemnity claim against the Club for his net payment [i.e., minus the deductible and the claimant's "ratable share of the setoff"] and the Club would be required to indemnify the Trustee for the net amount he paid. Dividing the Club's estimated total $1,200,000 setoff right by an estimated 10,000 claimants, the Second Circuit "estimated" the "pro-rata share" of the setoff at an average of about $120.[7] (App. A, 9a, 16a) Thus, that court

dential Lines, Inc., 158 F.2d 65 (2d Cir. 1998) (*Prudential IV*) (App. K, 242a).

[7] This mention of an estimated average pro-rata (or ratable) share of the total setoff right sidesteps the fact that,

would limit use of the Club's setoff to a miniscule sum of about $120 against each claim, rather than the way the Club is legally entitled to use it, (dollar for dollar, up to the $1,270,980 total), whereby the Club would pay nothing unless its full setoff right was exhausted. The improper PPS process would thus be repeated for each claim. With its funds repeatedly replenished, the Trustee would repeat the procedure until all claims were paid, a scheme in which the Trust has no financial interest, as it would merely funnel the Club's money to the claimants - a scheme devised solely to avoid the effect the Club's rightful setoff. As recognized by both the bankruptcy court and district court, the PPS would effectively grant the Asbestosis Claimants a direct action against the Club, an action prohibited by New York law. (App. C, 44a; App. B, 27a).

The obvious reason for devising and proposing the "PPS" was that under the Plan, Trustee had, and still has, severely limited Available Cash (now $100,000) with which to pay claims, so that if the Club were to utilize its setoff in the dollar for dollar manner to which it is legally entitled, the Trustee's $100,000 of Available Cash would be exhausted by the first $100,000 of claim payment/setoff application, and the Trustee would have no more funds to pay claims. Since the indemnity policies required that PLI (or, here, its successor Trustee) pay its liabilities *before* being entitled to indemnity, the Trustee would be neither liable to pay nor able to pay any claims

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as Point II discusses in detail, the Plan requires a ratable sharing of "a claim against the offset . . . amount," *not* the total offset right. Second Circuit never quotes the material provision, § 4.05.07(a)(iv), accurately.

aggregating more than the first $100,000 and thus could never trigger the Club's obligation to indemnify.[8] The PPS is no more than an improper device to enable the Trustee to obtain infusions of cash from the Club to which it is not legally entitled and pay, at the Club's sole expense, claims which the Trustee otherwise would be neither liable to pay, nor able to pay.

The Club opposed the joint motion, and the bankruptcy court denied it on January 19, 2005 by the unreported Memorandum Decision and Order. (App. C) Only MALC (not the Trustee) appealed to the District Court, which on September 21, 2005, affirmed the bankruptcy court decision and order. (App. B) This time both MALC and the Trustee appealed to the Second Circuit, which properly dismissed the Trustee's appeal due to his failure to appeal to the district court from the bankruptcy court decision. (App. M) Nevertheless, the Second Circuit thereafter heard and decided MALC's appeal, rendering its decision (App. A), reversing and remanding to the district court. After denying the Club's peti-

[8] The insurance policy and the Plan combined give the Club the right to refuse to indemnify for any claim exceeding the claimant's Pro Rata share of Available Cash ($100,000), since that is all the Trust is "liable to pay." However, even if it were wrongly held that the Trustee is "liable to pay" the full amount of each claim, without regard to Available Cash, since Trustee has so limited an amount of Available Cash, which the Club's offset amount greatly exceeds, Available Cash would be exhausted long before the Club would be obligated to indemnify, and then the Trust would be unable to pay any more claims. The Second Circuit in *Prudential IV*, 158 F.3d at 74-75, (App. K, 263a) termed this as "simply one consequence of purchasing a marine policy of indemnity rather than a liability policy."

tion for rehearing, the Second Circuit issued its Judgment on September 15, 2008. (App. E).

Second Circuit states its reasons for denying the Club the full use of its setoff (App. A, 14a-23a) with a deeply disturbing coda in n.6 at 22a. Much of what it wrote is speculative, wrong[9], and obviously irrelevant to its decision in this case, but at page 17a it distills its reasons into three:

> . . . The Insurer asks us to interpret the bankruptcy court's decision [*Prudential I*, 148 B.R. 730, App. H, 124a] granting a broader opportunity to setoff in a manner which would be unreasonable for three different reasons. *First, it asks that we construe a decision, which on its face simply granted it a broad opportunity for setoff, as effectively absolving it from any obligation to make payments under the policies. Second, it asks us to interpret the decision as granting exactly the relief the bankruptcy court, in the same decision, refused to grant. Finally, it asks us to interpret the bankruptcy court's decision in a manner contradictory to the Bankruptcy Plan, which expressly envisioned proration of the setoff.* We believe this is not a reasonable interpretation of

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[9] For example, there is no valid comparison between this case and *Liman v. American Steamship Owners Mutual Protection and Indemnity Association, Inc.*, 299 F. Supp. 106 (S.D.N.Y. 1969); aff'd 417 F.2d 627 (2d Cir. 1969) (per curiam), cert. den. 397 U.S. 936 (1970) as setoff was not an issue in that case. Second Circuit's comparisons at App. A, 18a-20a are misplaced.

> the bankruptcy court's silence as to how the setoff would be allocated . . .

App. A, 17a (emphasis added).

The first two reasons are readily refuted. First, the bankruptcy court's decision in *Prudential I* did not "simply grant [ ] . . . a broad opportunity for setoff". As stated above, the bankruptcy court explicitly granted the Club a setoff in the amount of $1,270,980, without any suggestion that Plan § 4.05.07(a)(iv) "authorized" or even "envisioned" piecemeal proration of the Club's setoff and without any reference to the potential consequences of the setoff which, as it has turned out, depend on the separate issue of the effectiveness of the Plan's provisions for providing funds for the Trust. In short, the bankruptcy court granted the requested setoff after careful legal analysis properly applying the law[10] without being improperly result-oriented. There is no legitimate reason whatever to raise a question as to "the bankruptcy court's silence as to how the setoff would be allocated", *supra*. Clearly, absent any contrary indication (and there is none), the setoff was not to be "allocated" at all, but applied fully against the Trustee's indemnity claims on the Club in the usual way as endorsed by decisions of this Court. In fact, expressly applying New York law, the bankruptcy court in *Prudential I* quoted from the New York statute providing the right

> . . . to setoff and apply against any indebtedness, whether matured or unmatured, of such creditor to such debtor,

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[10] See *Prudential I*, 148 B.R. at 750-52 (App. H, 166a-173a).

> *any amount owing* from such debtor to such creditor . . .

148 B.R. at 751 (App. H, 169a), (court's emphasis). This language fully confirms the logical and reasonable understanding that the setoff was to be exercised in the usual way and its exercise should *not* be "allocated". Contrary to Second Circuit's assertions (App. A, 21a), the Club cannot reasonably be charged with "failure" to appeal the bankruptcy court's judgment, as that judgment was correct and favored the Club.

Second Circuit's second "reason" is that the Club asked it "to interpret the [bankruptcy court's] decision as granting exactly the relief [it], in the same decision, refused to grant." This is patently incorrect. The Club had requested two alternative forms of relief—(1) setoff, which, as discussed above, the bankruptcy court granted, 148 B.R. at 750-52) (App. H, 166a-172a) and (2) that the Trustee assume all the policies under the *cum onere* doctrine, which the court discussed and denied at 148 B.R. at 752-753 (App. H, 172a-173a). The denial of the second, like the grant of the first, was made on the basis of the court's legal analysis and was not improperly result-oriented. Each of the two questions involved separate issues and was decided independently. Again, the fact that, sixteen years later, the reorganization plan has failed to generate more funds than it has is a separate circumstance irrelevant to the decisions on those issues. It was a possibility inherent in the Plan that such a circumstance might come to pass inasmuch as successful execution of its relevant provisions

was expressly "subject to the availability of funds", as discussed *supra*.

Second Circuit's third reason for denying the setoff is that the Club "asks us to interpret the bankruptcy court's decision in a manner contradictory to the Bankruptcy Plan, which expressly envisioned proration of the setoff." (App. A, 17a) That brings us to consideration of Second Circuit's own manner of "interpreting" (actually improperly rewriting) the Plan which is relevant and paramount to its denial of the Club's proper exercise of its setoff right and thus merits consideration as a related but additional ground for granting this petition, as will be set forth in Point II below.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE, IN APPROVING THE PPS, THE SECOND CIRCUIT UNJUSTIFIABLY DENIED THE CLUB ITS RIGHT TO FULL EXERCISE OF ITS SETOFF UNDER FEDERAL BANKRUPTCY LAW, IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

The PPS affords the Club only a limited application of its setoff right, i.e., for each claim paid by the Trustee for which he seeks indemnity, the Club would be restricted to getting the benefit (indirectly) of only a tiny "pro rata" part of its setoff, estimated by the Second Circuit at about $120. That is neither "authorized" nor "envisioned" by the Plan. Rather, it is contrary to the

Plan, the Bankruptcy Code and the law stated by this Court on more than one occasion.

In *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995), this Court stated the law as to setoff in the bankruptcy context:

> The right of setoff (also called "off-set") allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding "the absurdity of making A pay B when B owes A." Studley v. Boylston Nat. Bank, 229 U.S. 523, 528. Although no federal right of setoff is created by the Bankruptcy Code, 11 U.S.C. § 553(a) provides that, with certain exceptions, whatever right of setoff otherwise exists is preserved in bankruptcy . . .

Id. at 18. The Second Circuit decision causes the precise absurdity this Court refers to, making the Club pay the Trust while the Trust still owes the Club an amount it can never pay. In the case cited, *supra*, *Studley v. Boylston Nat. Bank*, 229 U.S. 523 (1913), this Court had further explicated the right of setoff:

> . . . in strictness, a set-off is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, *it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other.*

Id. at 528 (emphasis added).

The law of New York (the state whose setoff law is here preserved by 11 U.S.C. § 553(a)) is in full accord with this Court's view. In *Matter of Midland Insurance Co.*, 79 N.Y.2d 253, 590 N.E.2d 1186, 582 N.Y.S.2d 58 (1992), in the context of a dispute between an insolvent insurer and its reinsurer, the New York Court of Appeals allowed the reinsurer to offset all premiums due it from the primary insured and pay out only the *balance* remaining, stating:

> Our statutes also permit insurers to net their respective preliquidation debts. Thus, the insurance law provides "[i]n all cases of mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding [in rehabilitation or liquidation], such credits and debts shall be set off *and the balance only shall be allowed or paid.*

Id. at 258-59.

The proper meaning of setoff is also described in *Collier on Bankruptcy*, 15th Ed. Rev. ¶ 1100.08[4]:

> The Bankruptcy Code preserves a creditor's right to set off mutual obligations with the debtor. Thus, a creditor who owes money to the debtor may offset its indebtedness against the debtor's obligation and, in effect, recover the amount owed by the debtor through the set off process. For example, if a creditor owed a debtor $10,000 and the debtor owed the creditor $10,000 from another transac-

> tion, the creditor could set off the two debts and neither pay nor receive any money. Without a right of set off, the creditor would be required to pay $10,000 (the amount owed to the debtor) to the Trustee in bankruptcy and would have a general claim in the bankruptcy for the $10,000 that the debtor owed to the creditor. Since dividends in bankruptcy proceedings are normally considerably less than 100%, the creditor would lose money. Thus, by enabling the creditor to collect its claim through set off, the Code prefers that creditor over others, but the administrative efficiency and historical equitable right of mutual debtors to set off their claims was apparently seen as overriding any ill effect. (Citations omitted.)

If it be thought that granting the Club full exercise of its setoff would be "unjust" to Claimants, that type of consideration has been properly rejected by the Second Circuit itself. *See, e.g., In Re Applied Logic Corp.*, 576 F.2d 952, 957 (2d Cir. 1978):

> The rule allowing setoff, both before and after bankruptcy, is not one the Courts are free to ignore when they think application would be unjust.

See also n. 8 supra, quoting *Prudential IV.*

Unquestionably, the Club is legally entitled to use its court-ordered right of setoff of $1,270,980 in *full* satisfaction of whatever it might owe the Trustee *before* paying any amount to the Trustee. That means that the Club may exercise its right

of setoff up to its full amount "against sums payable to the Trust under triggered P&I policies", *see*, *Prudential I* at 754 (App. H, 166a-172a), discussed above.

II. REVIEW IS ALSO WARRANTED BECAUSE THE SECOND CIRCUIT—

(A) FAILED TO STATE OR APPLY ANY LEGAL RULE APPLICABLE TO INTERPRETING REORGANIZATION PLAN PROVISIONS,

(B) WITHOUT ANALYZING OR ACCURATELY STATING REORGANIZATION PLAN § 4.05.07(a)(iv), WRONGLY ASSERTED THAT IT "AUTHORIZED THAT ANY SETOFF OWED BY PRUDENTIAL TO AN INSURER BE SHARED RATABLY AMONG THE CLAIMANTS AND SUBTRACTED FROM EACH CLAIMANT'S INDIVIDUAL RECOVERY IN MUCH THE SAME WAY AS DEDUCTIBLES . . . ." IN SUCH A WAY AS TO DENY THE CLUB EXERCISE OF ITS ADJUDICATED SETOFF RIGHT FULLY AGAINST THE TRUST, WHEN IN FACT THAT SUBSECTION (iv) AUTHORIZED NOTHING OF THE KIND BUT INSTEAD MANDATED THAT THERE BE A RATABLE SHARING AMONG ALL AFFECTED CLAIMANTS OF A CLAIM AGAINST THE OFFSET AMOUNT, I.E., THE

TOTAL AMOUNT PREVIOUSLY OFFSET BY THE CLUB, AND

(C) IN "QUOTING" THAT PLAN PROVISION, EXCISED CERTAIN WORDS AND ADDED OTHERS IN BRACKETS, THEREBY REWRITING, DISTORTING AND CONCEALING ITS ACTUAL LANGUAGE AND TRUE MEANING, MISLEADINGLY LENDING SPURIOUS CREDENCE TO ITS WRONG ASSERTION OF WHAT PLAN 4.05.07(a)(iv) "AUTHORIZED",

ALL OF WHICH SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Second Circuit failed to state any legal rule applicable to interpretation of a reorganization plan, which is similar to a contract and generally interpreted under contract law principles of the state where the reorganization plan was confirmed. *See, C.F. Brookside, Ltd. v. Skyview Memorial Law Cemetery (In re Affordable Hous. Dev. Corp.)*, 175 B.R. 324, 329 (B.A.P. 9th Cir. 1994) cited by Bankruptcy Judge Gonzalez in the bankruptcy court decision below. (App. C, 47a) Judge Gonzalez also referred to Morlee Sales Corp. v. Manufacturers Tr. Co., 9 N.Y.2d 16 (N.Y. 1961) for two principles applicable here, but disregarded by Second Circuit:

> It is axiomatic that a contract is to be interpreted so as to give effect to the

> intention of the parties as expressed in the unequivocal language employed . . . The courts may not by construction add or excise terms, nor distort the meaning of those used and thereby "make a new contract for the parties under the guise of interpreting the writing."

Id. at 19, App. C, 47a (citations omitted). The bankruptcy court, viewing the Plan as a whole, held that that § 4.05.07(a)(iv) was "not ambiguous" and did "not require American Club to make any payments [to the Trust] prior to the satisfaction of its set-off right." (App. C, 49a)

The Second Circuit, without any analysis or explanation, wrongly states that Reorganization Plan § 4.05.07(a)(iv)

> . . . *authorized that any setoff owed by Prudential to an insurer be shared ratably among the Claimants and subtracted from each Claimant's individual recovery in much the same way as the deductibles (that is, each Claimant, out of the funds received in payment of his claims, would return to the Trustee his ratable share of the setoff and receive in exchange a claim for that amount*).

(App. A, 5a, emphasis added to indicate that part of the quotation from the Second Circuit's decision is inconsistent with and contrary to the actual language and meaning of subsection (iv), i.e., all of it.)

In fact § 4.05.07(a)(iv) does not so "authorize" nor is it reasonable to assert that it does. Sub-

section 4.05.07(a)(iv) actually states in material part:

> . . . To the extent there shall be a determination that amounts are due and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI, Reorganized PLI, the PLI Disbursement Trust or any claimant in respect of Excess Claims (and to the extent such amounts are not otherwise offset pursuant to § 4.05.07(a)(i) of the Plan or otherwise), and *to the extent possible*, each holder of an affected Allowed Insured Claim *shall share ratably* (with all other holders of affected Allowed Insured Claims *based on the allowed amount of each such Insured Claim*) (a) *a claim against the offset or recouped amount* and shall receive in distribution therefor an Allowed Claim in Class 5C and (b) a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefor, *to the extent recovered*,[11] cash from the insurer or Club equal to such holder's ratable share.

Plan, § 4.05.07(a)(iv), App. F, 77a-78a (emphasis added).

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[11] The qualifiers "to the extent possible" and "to the extent recovered" along with the qualifiers in other Plan sections clearly (a) reflect an uncertainty of result and (b) preserve the American Club's defenses, as expressly held by the bankruptcy court. (App. C, 49a)

A comparison of Second Circuit's assertion as to what § 4.05.07(a)(iv) supposedly "authorized" with the actual language of the subsection makes it clear that, far from "authorizing" the procedure the Second Circuit describes, the subsection, using the mandatory "shall", actually *requires*, focusing on the material part, that:

> . . . *to the extent possible*, each holder of an affected Allowed Insured Claim *shall share ratably* (with all other holders of affected Allowed insured Claims based on the allowed amount of each such Insured Claim) (a) *a claim against the offset or recouped amount* . . . (emphasis added)

§ 4.05.07(a)(iv), *supra*. This mandatory language makes it clear that the holders of claims *shall* share ratably among themselves a *claim* (singular) *against the offset or recouped amount*, also singular and, by clear use of the past tense in the adjectival "offset or recouped" (both modifying "amount") necessarily meaning the amount *already* offset or recouped vis-à-vis the Trust's claim(s) on the Club; and use of the definite article, "the", signifies that a particular single amount is meant, which logically can only mean the total amount offset.[12] Moreover, the qualifiers "to the extent possible" and "to the extent recovered" make it clear that the Plan's drafters, the Committee of Unsecured Creditors and others (App. F, 60a), were fully aware that carrying out

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[12] Quite apart from a verbal and grammatical analysis, calculating piecemeal ratable shares of successive offsets "owed by Prudential" before the offset amount is known and thereafter calculating the overall ratable shares would be an accounting nightmare, if it could be done at all.

this provision of the Plan might be impossible or possible only to a limited extent. It is clear that subsection (iv) actually provides only for a ratable sharing among affected claimants of a claim against *the* [previously] offset amount, *not* a ratable sharing of "any setoff owed by Prudential", as Second Circuit wrongly asserts. Its statement of what the subsection "authorized" is flatly contradicted by the actual subsection and effectively is a rewriting of that subsection. Indeed, Second Circuit's statement of what subsection (iv) "authorized" was obviously drawn in substance entirely from the PPS proposed by MALC and the Trustee, *not* the actual Plan § 4.05.07(a)(iv).

Additionally, it is plain that § 4.05.07(a)(iv), cannot be implemented as its language clearly requires without knowing (a) the total of the offset amount, (b) the amount of each Allowed Insured Claim and hence (c) the total amount of all such claims, because only by determining (a), (b) and (c) would it be possible to calculate each claimant's ratable share of a claim against *the* offset amount, as the subsection requires.

The PPS approved by Second Circuit clearly violates those requirements in that (a) it would *not* be applied to *the* single offset amount and (b) could *not* utilize a ratable share, the percentage of which would necessarily be based on the allowed amount of each claim divided by the total amount of all allowed claims. Instead, it would wrongly use a piecemeal system of successive payments and, Second Circuit suggests, some sort of an estimated "average" to supplant each affected claimant's ratable share of the offset amount. (App A, 9a, 16a) But such an estimated

"average" is simply not the "ratabl[e] share" mandated by § 4.05.07(a)(iv). Moreover, Second Circuit's assertion *supra* at p. 21 that subsection (iv) "authorized that any setoff *owed by Prudential* to an insurer be shared ratably among the claimants and subtracted from each Claimant's individual recovery in much the same way as deductibles . . ." is inconsistent with and contrary to the procedure specified and required by subsection (iv). As discussed above, subsection (iv) mandates a ratable sharing only of a (singular) claim against *the* offset amount (i.e., as explained above, surely the single total amount already offset).

The foregoing illustrates why the PPS differs from the actual procedure in subsection (iv). But the basic reality of the matter is that the "ratable share" provision of subsection (iv) mandates a procedure very different from the PPS and simply does not "authorize" the PPS, nor does any provision of the Plan. Finally, the actual subsection (iv) is fully consistent with the proper application of a setoff, whereas the PPS is not.

The Second Circuit Opinion never analyzes the actual language of § 4.05.07(a)(iv). Worse yet, when, at last, it "quotes" that section, it violates the most basic principle of contract interpretation by changing the phrase "(a) a claim against the offset or recouped amount" (see our quotation, *supra* at p. 22) to read ". . . (a) a claim against the offset [as represented by a claim against the Trust]" (App. A, 22a, n.6)—thus improperly rewriting that provision! Second Circuit's misquotation of the subsection has a dual effect. By excising the key words, "or recouped

amount", and substituting its invented bracketed phrase, "[as represented by a claim against the Trust], the court (1) conceals the actual language and true meaning of the subsection and (2) lends apparent (but spurious) credibility to its initial inaccurate assertion of what the subsection "authorized," at App. A, 5a, quoted *supra* at p. 21. In this connection, the omission of subsection (iv)'s actual language conceals the fact that the subsection actually refers to sharing ratably a claim against "the [single] offset ... amount" necessarily one previously offset (obviously by the Club against the Trust, as the Club's offset was only enforceable against the Trust), not a series of piecemeal setoffs "owed by Prudential to an insurer", and applied against the claimant, as the PPS would have it. And substituting the phrase ["as represented by a claim against the Trust"] suggests wrongly that the ratable sharing of the offset amount is to be determined or estimated before the setoff has even been applied, contrary to the subsection's actual requirements.

Second Circuit's decision is so constructed that one cannot discern simply by reading it that Second Circuit initially asserted that subsection (iv) "authorized" something it had not in fact authorized and thereafter "quoted" the subsection in such a way as to conceal its true meaning and make it seem consistent with the Court's initial assertion, at least to an unsuspecting reader. In short, the Second Circuit has improperly rewritten Plan § 4.05.07(a)(iv) and effectively concealed that fact.

Second Circuit thus grossly departed from the accepted and usual course of judicial proceedings so far, we respectfully submit, as to call for an exercise of this Court's supervisory power. That departure was the principal factor in Second Circuit's erroneous denial of the Club's right to proper full exercise of its setoff against the Trust, before paying any amount to the Trust.

CONCLUSION

As the Second Circuit's decision on setoff conflicts with this Court's decisions and its effective rewriting of the Plan and concealment thereof are glaring departures from the accepted and usual course of judicial proceedings calling for the exercise of this Court's supervisory power, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

RICHARD H. BROWN, JR.
Counsel of Record

Of Counsel to
NOURSE & BOWLES, LLP
One Exchange Plaza
55 Broadway
New York, New York 10006
(212) 952-6200

Attorneys for Petitioner
American Steamship Owners
Mutual Protection and
Indemnity Association, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2007

(Argued: October 29, 2007
Decided: June 19, 2008)

Docket No. 05-5925-bk

IN RE: PRUDENTIAL LINES INC.,
Debtor.

ASBESTOSIS CLAIMANTS,
Claimants-Appellants,

—v.—

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC.,
Appellee.

Before:

MINER, LEVAL, POOLER,
Circuit Judges.

Appeal by holders of claims against the bankruptcy estate of a shipping line from the affirmance by the United States District Court for the Southern District of New York (Buchwald, *J.*), *In re Prudential Lines*, No. 05 Civ. 2810, 2005 U.S. Dist. LEXIS 20657 (S.D.N.Y. Sept. 21, 2005), of the denial by the United States Bankruptcy Court for the Southern District of New York (Gonzalez, *J.*), *In re Prudential Lines*, No. 86-B-11773 (AJG) (Bankr. S.D.N.Y. Jan. 19, 2005), of a motion by the trustee and the claimants for approval of aspects of a proposed structure to pay claims and receive insurer's indemnity thereon, as against the insurer's contention that the proposed structure violates the pay-first requirement of the indemnity policies. Reversed and remanded.

SANFORD F. YOUNG, Law offices of Sanford F. Young, New York, New York (Alan Kellman, The Maritime Asbestosis Legal Clinic, a Division of the Jacques Admiralty Law Firm, P.C., *on the brief*), *for Appellants.*

LAWRENCE J. BOWLES, Nourse & Bowles, LLP, New York, New York, *for Appellee.*

LEVAL, *Circuit Judge*:

This is an appeal by numerous individual creditors (the "Claimants") of Prudential Lines, Inc. ("Prudential") from a ruling of the United States District Court for the Southern District of New York (Buchwald, *J.*), which affirmed the United States Bankruptcy Court for the Southern District of New York (Gonzalez, *J.*) in denying a motion jointly made by Claimants and Prudential's Trustee in bankruptcy (the "Trustee") against Prudential's liability insurer, the American Steamship Owners Mutual Protection and Indemnity Association (the "Insurer"). The motion sought two orders enabling the Trustee to undertake a proposed structure for the use of insurance indemnities to pay the claims of the Claimants (the "Proposed Payment Structure"). The motion primarily asked the bankruptcy court (1) to reject the objections of the Insurer to the Proposed Payment Structure and (2) to direct that setoffs to which the Insurer was entitled by virtue of unpaid premiums on four years of coverage be prorated among the claims.

The Proposed Payment Structure was to involve a series of transactions whereby the Trustee would make a payment of a Claimant's claim and then submit the payment to the Insurer for indemnification. The Trustee would use the proceeds of the indemnity payment to pay further claims, then seek further indemnification, and repeat the process until all claims were paid. The Insurer, which is the appellee in this proceeding, successfully opposed Claimants' motion in the bankruptcy court and on appeal to

the district court. At issue in the two rulings sought was whether the Proposed Payment Structure violates (i) the terms of Prudential's indemnity policy with the Insurer; (ii) the Bankruptcy Plan, which was approved in 1990; or (iii) the terms of the Insurer's right of setoff relating to unpaid premiums (the "Unpaid Premiums") for certain calendar years of Prudential's coverage by the Insurer. We find that the reasons for which the bankruptcy and district courts rejected the Proposed Payment Structure are not valid. Accordingly, we reverse and remand.

BACKGROUND[1]

Prudential, a shipping line, went bankrupt in 1986. The Claimants in this proceeding are many thousands of its former employees, perhaps as many as 10,000, who suffered illness or injury in the course of their employment, particularly through exposure to asbestos. The total of the Claimants' valid claims might amount to tens of millions of dollars.

For forty-one years (almost entirely continuous), Prudential was covered by liability insur-

[1] This case has a long history in the courts of this circuit. *See In re Prudential Lines, Inc.*, 148 B.R. 730 (Bankr. S.D.N.Y. 1992) ("*Prudential I*"); *In re Prudential Lines, Inc.*, 170 B.R. 222 (S.D.N.Y. 1994) ("*Prudential II*"); *In re Prudential Lines, Inc.*, 202 B.R. 13 (Bankr. S.D.N.Y. 1996) ("*Prudential III*"); *In re Prudential Lines Inc.*, 158 F.3d 65 (2d Cir. 1998) ("*Prudential IV*"). We refer to the district court decision in this case as "*Prudential V*." *In re Prudential Lines*, No. 05 Civ. 2810, 2005 U.S. Dist. LEXIS 20657 (S.D.N.Y. Sept. 21, 2005).

ance issued by the Insurer. *See Prudential II*, 170 B.R. at 226. The policies, each covering one year, were structured as indemnities, meaning that liability claims against Prudential could not be submitted directly to the Insurer, but were required to be paid first by Prudential, which may then submit to the Insurer for reimbursement (minus a deductible). *Prudential IV*, 158 F.3d at 68.

Upon its bankruptcy, Prudential did not have sufficient funds to pay the aggregate valid claims of the Claimants. *Prudential IV*, 158 F.3d at 68-69. Under the bankruptcy plan approved by the bankruptcy court in 1990 (the "Plan"), "to the extent necessary to obtain payment by . . . [an] insurer," the Trustee was "authorized to enter into arrangements" whereby the Trustee would pay claims "in cash" and would then be repaid the amount of the deductible by the Claimant in return for a claim against the Trust for that amount. Bankruptcy Plan § 4.05.07(a)(i); *Id.* The Trustee was authorized "alternatively [to] enter into any lawful arrangement designed to achieve the same purpose." Bankruptcy Plan § 4.05.07(a)(i). The Plan also contained a provision, which authorized that any setoff owed by Prudential to an insurer be shared ratably among the Claimants and subtracted from each Claimant's individual recovery in much the same way as the deductibles (that is, each Claimant, out of the funds received in payment of his claims, would return to the Trustee his ratable share of the setoff and receive in exchange a claim for that amount). Bankruptcy Plan § 4.05.07(a)(iv). In order to have funds with which to pay claims,

thus satisfying the requirement of the policies that Prudential "pay first," the Plan directed the Trustee (i) to set aside $300,000 to be used by the Trustee to make payments to some of the Claimants; (ii) to submit to the Insurer for reimbursement; (iii) to use that reimbursement to pay additional Claimants; and (iv) to again submit for further reimbursement from the Insurer and to repeat the process so that "the $300,000 [would be] available as needed on a sustaining basis for use in funding the payment of [insurance claims]." Bankruptcy Plan § 4.05.07(a)(i). Because the aggregate claims were vastly larger than the $300,000 set aside for this purpose, the Plan included a provision that funds were not to be paid out to Claimants unless "adequate assurances and documentation" were received by the Trustee that it would be reimbursed for the moneys so paid out in claims. *Id.* If there were money remaining after payment of all claims, the Trustee was to petition the bankruptcy court to use these funds to pay on a pro-rata basis those claims issued to Claimants in exchange for their return of the portions of the claim payments attributable to the deductibles and any setoff. § 4.05.07(a)(v).

It was of course foreseen that this cumbersome procedure of first paying claims in small amounts, then seeking reimbursement from the Insurer, and then using the reimbursed funds to pay additional claims—and repeating the process hundreds, or even thousands, of times—would take a very long time and require very considerable administrative effort and expense. For that reason, the Trustee in 1993 sought to put in

place a different, more efficient structure, referred to as the "Recycling Plan," to accelerate the process. In brief, under the Recycling Plan, the Trustee would pay each claim and simultaneously receive back from the Claimants a loan of the full amount of the payment. The Trustee would then submit the payments to the Insurer for indemnification and use the indemnity payments to repay the Claimants's loans. *Prudential IV*, 158 F.3d at 69-70. Under this Recycling Plan, no money actually changed hands when the Trustee paid on claims and received back a loan of the proceeds.

This court sustained the Insurer's objections to the Recycling Plan because the Claimants "received nothing of value from Prudential, and Prudential sustained no true loss" in making the payments; we found that the Recycling Plan amounted to a "sham" with respect to Prudential's obligation to pay first, which did not "trigger[ ] an indemnification obligation under New York law." *Id.* at 74.

Rebuffed by this court's rejection of the more speedy and efficient Recycling Plan, the Trustee then returned to the dictates of the 1990 Bankruptcy Plan and prepared what we refer to as the Proposed Payment Structure. The Proposed Payment Structure has the following characteristics: (1) Within the limits of the $300,000 retention, the Trustee pays claims of Claimants. (Presumably, the Trustee would not pay until it received the Insurer's approval (or a court order) as to the validity and amount of the particular claim and the propriety of the payments structure.) (2) These Claimants return to the Trustee

(in exchange for a deferred claim) the portion of the payment attributable to the deductible amount, plus their pro-rata share of any setoff. (3) The Trustee seeks and receives indemnification from the Insurer in the amount of the claim payment, minus the deductible and the Claimant's ratable share of the setoff. (4) The Trustee uses the reimbursed funds to make further payments to Claimants. (5) The process repeats itself until all Claimants are paid. (6) After this process is complete, any remaining cash will be distributed to the Claimants pro-rata on their limited claims for recovery of the amounts attributable to the deductible and setoff.

The setoff envisioned by this Structure results from the following. When Prudential went into bankruptcy, it owed the Insurer approximately $1.2 million in unpaid premiums and assessments on four years (out of forty-one) of the policies (the "Unpaid Premiums"). In 1992, in *Prudential I*, the Insurer sought, and was granted by the bankruptcy court, the opportunity to setoff the Unpaid Premiums attributable to the four years of delinquency against indemnity payments made with respect to coverage under the fully paid years (as well as the unpaid years). *See Prudential I*, 148 B.R. at 752.

In order to proceed with payments to the Claimants under the Proposed Payment Structure, the Claimants and the Trustee filed the motion here under review in the bankruptcy court seeking the two rulings. Because the Insurer had withheld any assurance that such payments of claims would be indemnified and

had argued that such a structure would violate the requirement of the indemnity policies that claims be paid first by Prudential before any obligation would fall on the Insurer to make its indemnity payment, the motion asked the court to rule on the Insurer's obligation to reimburse the Trustee for claim payments made under this structure. *See Prudential I*, 148 B.R. at 749 ("Should the [Insurer] refuse to provide indemnity in breach of its obligations under the policies, we [, the bankruptcy court,] have no doubt that we possess the necessary power to provide adequate assurance of reimbursement."). In addition, the motion asked the court to approve the ratable allocation of the Insurer's $1.2 million setoff among all of the indemnity payments to be made on account of the Claimants' claims. That is, as to each indemnity payment relating to a particular Claimant, the Insurer would deduct that proportion of the $1.2 million setoff equal to the proportion of that Claimant's approved claim to the aggregate approved claims. Thus an average of around $120 would be setoff against the reimbursement paid on account of the claims of approximately 10,000 claimants, and the Insurer would recover its $1.2 million setoff piece-by-piece as it reimbursed the Trustee for the claims paid.

The bankruptcy court denied both parts of the proposed motion, and the district court affirmed. The courts gave the following closely related reasons. The courts ruled that the Proposed Payment Structure was like the sham disallowed in *Prudential IV* as not conforming to the "pay-first" requirement of the indemnity policies. The pro-

vision requiring the Insurer to pay the indemnities before satisfaction of its setoff was found to be tantamount to giving the Claimants a "direct claim" against the Insurer, which is prohibited by New York law, as explained in *Prudential IV*. Finally, the courts viewed the proration of the setoff as inconsistent with both the "pay first" provisions of the insurance policies and the Bankruptcy Plan. We respectfully disagree.

DISCUSSION

A. The Pay-First Provisions of the Indemnity Policies.

Because of lack of sufficient funds, the bankrupt estate was not capable of paying the aggregate claims and then submitting them to the Insurer for indemnification. To circumvent that problem, the Trustee and the Claimants developed the seriatim approach set forth in the Bankruptcy Plan and now in the Proposed Payment Structure. The Insurer contends essentially, in support of the rulings below, that the Structure does not respect the Insurer's right to withhold indemnity payments until the claim has first been paid. We disagree. The Proposed Payment Structure is elaborate and cumbersome precisely because it has been designed to conform to the Insurer's right to pay on account of a claim only after the insured has paid the claim.

If in another context an insured were simply to take up one claim at a time, paying one claim, then submitting that payment to the Insurer for

indemnification, then paying a second claim and subsequently submitting that payment for indemnification, and continuing in that fashion, there would be no conceivable argument that it was violating the pay-first requirement of the indemnity policy. The fact that under the Proposed Payment Structure this sequence has been planned in advance, rather than occurring haphazardly, does not change the fact that the Trustee does not submit a claim to the Insurer until after having made payment thereon to the Claimant.[2]

The main thrust of the Insurer's argument, and of the rulings of the courts below, is that the Proposed Payment Structure, like the previously rejected Recycling Plan, is a sham, which should be rejected—for the same reasons as given in *Prudential IV*. But that Plan was significantly different from the present Proposed Payment Structure.

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[2] To the extent it is arguable that the Insurer's right to have the claim paid first is not respected as to the portion of his claim that each Claimant returns to the Trustee (against a further claim), which is attributable to the policy deductible, the Insurer has abandoned the contention because this court rejected the same contention in *Liman v. American Steamship Owners Mutual Protection and Indemnity Ass'n*, 299 F. Supp. 106 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 627 (2d Cir. 1969) (per curiam), *cert. denied*, 397 U.S. 936 (1970), and, in *Prudential II*, 170 B.R. at 241 n.13, the district court, citing *Liman*, rejected the Insurer's argument. On the other hand, the Insurer does contend that the claims will not have been paid prior to the demand for indemnification to the extent that the Trustee's payment to Claimants will withhold that Claimant's pro-rata portion of the Insurer's $1.2 million setoff. This contention is discussed below.

As discussed briefly above, the Recycling Plan, which we rejected in *Prudential IV*, worked as follows. Instead of paying individual claims and waiting for repayment from the Insurer, as in the Proposed Payment Structure, the heart of the 1998 Recycling Plan was that, simultaneous with the receipt of payment of a claim, each claimant would lend the money received back to the Trustee. *Prudential IV*, 158 F.3d at 69-70. No cash would change hands. The Trustee would simply issue a non-recourse note to the Claimant. Using that procedure, the Trustee rapidly "paid" claims exceeding $60 million, without actually disbursing any cash, and then submitted the aggregate amount of those assertedly paid claims to the Insurer for reimbursement. We reasoned in rejecting the proposal that the "[t]he only detriment assumed by Prudential vis-a-vis each Claimant is a wholly non-recourse debt, which in financial terms is—and is intended to be—nothing . . . [T]he Asbestosis Claimants received nothing of value from Prudential, and Prudential sustained no true loss." *Id.* at 73-74. The transactions were found to be a "sham" designed to provide an appearance of having paid first, so as to appear to comply with the cumbersome pay-first requirement of the indemnity policies without actually doing so. *Id.* at 74.

In concluding that our ruling in *Prudential IV* bars the Proposed Payment Structure, the bankruptcy court and the district court read far more into that ruling than is there. The Recycling Plan represented an effort to avoid the time-consuming inefficiencies that would result from the cumbersome process of first paying

small numbers of claims, and having to wait before payment of further claims to receive reimbursement on the previously paid claims. The device embodied in the Recycling Plan essentially created fictional prior payments to escape the obligation to make prior payment. Our ruling rejecting that fiction, however, in no way implied that the Trustee's shortage of funds, which would effectively prevent the Trustee from paying all the claims without receipt of reimbursement, would also prevent the Trustee from seeking indemnification *after* making a payment and using the funds received pursuant to that indemnification to pay further claims. The Proposed Payment Structure is not subject to the criticisms of *Prudential IV*. It is not a sham. In the case of each paid claim, the Claimant will have received, and the Trustee will have paid, actual cash. Each payment under the Proposed Payment Structure is made prior to seeking indemnification for that payment. In the event the Insurer were to fail, by reason of insolvency or for whatever reason, to pay the indemnity provided by the insurance policies, the Trustee would have no way to recover the cash paid out to the Claimant. We reject the contention, on which the bankruptcy court and the district court relied, that our ruling in *Prudential IV* invalidating the Recycling Plan similarly calls for the invalidation of the Proposed Payment Structure.[3]

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[3] In *Prudential IV*, we also looked to New York law, which governs these policies, and for very similar reasons found that the Recycling Plan was barred because it amounted to a forbidden "direct action" against the Insurer. *Prudential IV*, 158 F.3d at 74-76. In considering New York

B. The Insurer's Right to Setoff Prudential's $1.2 Million in Unpaid Premiums.

The Insurer asserts that the handling under the Proposed Payment Structure of its right of setoff for the liability of Prudential for $1.2 million in unpaid premiums for four years of policies violates the terms of the indemnity policies and the Bankruptcy Plan. The lower courts so found. We disagree for several different reasons.

It is important to understand at the outset how this right of setoff accrued to the Insurer as the result of Prudential's unpaid premiums on four policies. Initially there was no right of setoff. Prudential had failed to pay the required premiums for policies covering four (of the forty-one) years of coverage. For that reason, it appears the Insurer could have rejected claims submitted under the policies for the four unpaid years. Prudential's failure to pay its premiums, which made the four unpaid policies voidable, however, had

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law, we distinguished one leading New York case from the Recycling Plan at issue primarily on the grounds that, though it appears that the New York courts had blessed a similar arrangement, we noted that "the non-party lender in [the New York case] performed a real financial service for a real financial reward, whereas the recycling of funds by the [Prudential] Trustee here is an illusion." *Id.* at 76 (discussing *Feldman v. New York City Health & Hosps. Corp.*, 107 Misc.2d 145, 437 (N.Y. Sup. Ct. 1981), *rev'd*, 445 N.Y.S.2d 555 (N.Y. App. Div. 2d Dep't 1981), *rev'd*, 56 N.Y.2d 1011 (N.Y. 1982)). For the same reason that the Proposed Payment Structure satisfies the policies as a matter of contract interpretation because the Trustee will be doing exactly what the contract anticipated, so too New York law poses no obstacle because the Trustee will be making real payments.

no effect on the other policies, which were fully paid.

In 1992, the Insurer, presumably fearing that the Trustee would simply present claims arising under the thirty-seven years of fully paid policies, asked the bankruptcy court to rule that "it is entitled to offset the 1979, 1983, 1984 and 1985 past-due premiums and assessments against the benefits to be paid the Asbestosis Claimants under fully paid policies for different insurance years." *Prudential I*, 148 B.R. at 750. The bankruptcy court noted that it would allow the Insurer to setoff the unpaid premiums against all policies, including the fully paid ones, but that the Insurer could not both use the unpaid premiums to invalidate the policies for the unpaid years and at the same time apply the debt for unpaid premiums by setoff to indemnity payments made on fully paid policies. Thus, the bankruptcy court indicated that, in granting the Insurer's motion to be allowed to setoff the unpaid premiums against indemnity payments on fully paid policies, it would also bar the Insurer from relying on the nonpayment of premium as a basis for refusing to indemnify under the unpaid policies. *Id.* at 752 (Insurer "could no longer use nonpayment as a reason not to indemnify under the relevant policies if coverage were triggered.").[4]

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[4] This opinion assumes because the bankruptcy court so indicated in *Prudential I* that, if the Insurer were to move for leave to set off the $1.2 million in Unpaid Premiums against all claims, relinquishing any claim of right to reject claims made under the unpaid years, the bankruptcy court would grant the motion. In making this assumption, how-

The Proposed Payment Structure, as noted above, provides that when a Claimant receives payment in cash on account of his claim, he will return to the Trustee his pro-rata share (ratably allocated among all the claims of the Claimants) of the $1.2 million setoff, in return for a limited claim to recover the Claimant's ratable share of any funds that may remain in the Trustee's possession after paying all the claims and receiving the Insurer's indemnification for those payments. Based on the estimate of 10,000 Claimants, the average setoff relating to each claim would be approximately $120.

The Insurer's principal argument concerning the setoff is that the Insurer is entitled to setoff the entire $1.2 million, dollar for dollar, against all claims submitted to it before being obligated to make any indemnity payments in cash. It adds that because the setoff right of $1.2 million exceeds the $300,000 retained by the Trustee, that the Trustee can never be in a position to make prior payments to Claimants that the Insurer would be compelled under the policies to indemnify in cash. We reject both arguments.

The Insurer's argument misinterprets and distorts the right accorded to it by the bankruptcy court. The Insurer essentially sought two alternative forms of relief. It argued first that the Unpaid Premiums should absolutely protect it from any obligation to make payments under any of the policies. *Prudential I*, 148 B.R. at 752-53. In the event that relief were denied, it sought, as

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ever, we in no way imply that the bankruptcy court is under a direction to do so.

a fallback position, to be accorded the right to setoff the Unpaid Premiums against payments on fully paid years, as well as unpaid years. *Id.* at 750. The bankruptcy court denied the first request, which would have barred all indemnity payments, but granted the second, *id.* at 753, without specifying the manner in which the setoff would be taken. (The already approved Bankruptcy Plan, *id.* at 735, provided that the setoff of debts owed by Prudential to an insurer be ratably shared among the Claimants.) The Insurer asks us to interpret the bankruptcy court's decision granting a broader opportunity to setoff in a manner which would be unreasonable for three different reasons. First, it asks that we construe a decision, which on its face simply granted it a broad opportunity for setoff, as effectively absolving it from any obligation to make payments under the policies. Second, it asks us to interpret the decision as granting exactly the relief the bankruptcy court, in the same decision, refused to grant. Finally, it asks us to interpret the bankruptcy court's decision in a manner contradictory to the Bankruptcy Plan, which expressly envisioned proration of the setoff. We believe this is not a reasonable interpretation of the bankruptcy court's silence as to how the setoff would be allocated. It seems most reasonable to interpret the ambiguous (or incomplete) provision of the setoff order as intending, consistent with the Bankruptcy Plan, to allow the setoff of the Unpaid Premiums against all policy years prorated among all Claimants, and not to interpret it as an absolution, parlaying the Insurer's immunity as to four unpaid policy years into an immunity also covering thirty-seven fully paid years.

A further defect in the Insurer's argument is its assumption that the excess of the $1.2 million owed to it over the $300,000 retained by the Trustee to pay claims makes clear that the Trustee cannot comply with the pay-first requirement so as to trigger an obligation to indemnify in cash. This assumes that the terms of the policies forbid the Trustee from using financing to pay claims. The assumption is incorrect. *Cf. Prudential IV*, 158 F.3d at 71 ("At oral argument, the parties agreed that there are other available mechanisms (albeit less efficient) for triggering American Club's indemnification obligations."); *id.* at 76 (distinguishing New York case authorizing third-party lender as a case with a "real financial service [provided] for a real financial reward"); *Prudential II*, 170 B.R. at 242 n.14 ("As it presents an entirely different situation, I take no position on the permissibility of triggering indemnification by borrowing funds from third parties other than claimants."); David Gray Carlson, *The Bankruptcy Code: Indemnity, Liability, Insolvency*, 25 Cardozo L. Rev. 1951, 1963 (2004) (arguing that our decision in *Prudential IV* "virtually invited" the Trustee to look to a third-party lender). Under the Proposed Payment Structure, a small portion of the claim payment is financed by the Claimant. If too large a portion of the claim payment were financed by the Claimant, the prior payment to the Claimant might well be deemed a "sham," as was found under the Recycling Plan, but the same is not true of such financing of a small portion.

A further reason for rejecting the Insurer's position lies in the ruling of this court in *Liman*

v. American Steamship Owners Mutual Protection and Indemnity Ass'n, 299 F. Supp. 106 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 627 (2d Cir. 1969) (per curiam), *cert. denied*, 397 U.S. 936 (1970). *Liman* involved an identical policy issued by the same Insurer to a different shipping line. *Prudential IV*, 158 F.3d at 72. At issue in that case was a proposed structure for the prior payment of claims under which each claimant, upon receipt of payment on his claim, would lend back to the estate the amount of any deductible under that policy, so that the funds of the bankrupt estate would not be gradually diminished by the repeated receipt of indemnifications which covered less than the full amount of the payment on the claim. *Liman*, 299 F. Supp. at 108-10. In return for lending back the amount of the deductible, the claimant would become a "general creditor" of the estate in the amount of the deductible. *Id.* The Insurer contended, as here, that this feature was not compatible with the "pay- first" provisions of the indemnity policies. The district court in *Liman* rejected the argument, *id.* at 110, and this court affirmed. 417 F.2d 627-28 (2d Cir. 1969) (per curiam). The pay-first provisions of the indemnity policies did not forbid using borrowed moneys to pay the claim, and the trustee was paying the deductible portion of the claim with funds borrowed from the claimants. Furthermore, the district court observed that the matter should be of "no concern to the [Insurer], since it is not required to reimburse the estate " for the amount of the deductible in any event. *Liman*, 299 F. Supp. at 110.

In accordance with the *Liman* ruling, in an unappealed portion of *Prudential II*, the district court found in this case that the same method for financing payment of the deductible portion of the payment of each Claimant's claim did not violate the Insurer's right under its indemnity policies to have the claim paid first, before triggering the Insurer's indemnification obligation. 170 B.R. at 241 n.13.

The treatment of the small amounts returned by each Claimant to the Trustee, by reason of the Insurer's right of setoff, is structured almost identically to what we approved in *Liman* as to the deductible, and what was approved by the district court in this case and was not appealed. We find that the setoff right given to the Insurer under these circumstances does not violate the pay-first provision of the policies.[5]

As noted above, the Insurer also renews a different argument to the effect that Prudential's failure to pay the premium on four of its policies bars Prudential (and its Trustee) from making claims for indemnity on any policies, including those which were fully paid. The Insurer argues that the terms of each year's policy required that *all* policies be fully paid before the Insurer would have an obligation to pay on *any* of them.

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[5] Nor is the Insurer correct in arguing that the claim given by the Trustee to the Claimants in exchange for their return of proceeds attributable to the setoff is necessarily "worthless." If payments are made and indemnities reasonably paid without giving rise to excessive and wasteful adminis-trative expenses, the Trust should still be in possession of a significant portion of the $300,000 retained at the conclusion of the process to be used to pay those claims.

There are two sufficient reasons for rejecting this contention. First, it was waived by the Insurer's failure to appeal a ruling of the bankruptcy court, which rejected the argument. Second, the contention is not borne out by the terms of the policies.

In *Prudential I*, the bankruptcy court considered and rejected this argument:

> The insurance policies [Insurer] issued to [Prudential] were separate and distinct contracts. No policy language conditions indemnification on the payment of premiums and assessments due under different policies. Each policy contained its own period of coverage, deductible, and policy limit. Trustee is therefore free to choose among the paid policies for ultimate indemnification of asbestos claims according to his determination of which policies benefit the estate.

Prudential I, 148 B.R. at 753.

This aspect of the bankruptcy court's decision was not appealed. *See Prudential II*, 170 B.R. at 242 (this part of *Prudential I* not appealed to district court). As a result, the Insurer is barred from now raising the same contention. *See, e.g., In re Klein Sleep Prods., Inc.*, 78 F.3d 18, 29 (2d Cir. 1996) (challenge to decision of bankruptcy court not raised before the district court considered waived).

Even if this argument were not barred by the prior unappealed ruling, the language of the policies on which the Insurer relies does not support its contention. The language contained in each year's policy was to the following effect: "[S]hould

the Assured . . . become insolvent or bankrupt . . . the [Insurer] shall not be liable for any claims whatsoever *under this policy* unless within sixty (60) days . . . there are paid to the [Insurer] . . . *all premiums due* . . . ." (emphasis added). The Insurer contends that the phrase "all premiums due" must be interpreted to mean all premiums due on *any* policy. But the sentence explicitly refers to "claims under this policy." The policy language in question makes no mention of other policies in effect as between the Insurer and insured. The most natural reading of this sentence is to mean that the Insurer shall not be liable for claims under the policy unless all premiums due under it have been paid in full.

At best the language is ambiguous. Under New York law, ambiguity is of no help to an insurer seeking to avoid providing coverage. *See, e.g., Burriesci v. Paul Revere Life Ins. Co.*, 679 N.Y.S.2d 778, 779 (N.Y. App. Div. 4 Dep't 1998); *see also Village of Sylvan Beach, N.Y. v. Travelers Indem. Co.*, 55 F.3d 114, 115 (2d Cir. 1995).

The Insurer's final argument is that the Bankruptcy Plan itself requires that it be paid its setoff before it must indemnify the Trustee. We find no merit whatsoever in the argument. There is indeed a complex, lengthy provision in the Plan which refers to setoff and recoupment and which employs the phrase "to the extent" or "to the extent possible." The provision in relevant part is set forth in the margin.[6] The Insurer con-

[6] "To the extent there shall be a determination that amounts are due and owing from [Prudential] to a Club or insurer which the Club or insurer may offset or recoup against amounts due to [Prudential] . . . or any claimant in

tends that this provision means that pro-rata distribution of the setoff among Claimants is permissible only *to the extent* the funds available to the Trustee are greater than the total setoff. The problem with the argument is that the provision simply does not say what the Insurer says it says. The argument is frivolous.

We have reviewed the various reasons given by the bankruptcy court and the district court for rejection of the Trustee's motion and find them to be erroneous. Nor do we find any valid reasons asserted by the Insurer for rejection of the Proposed Payment Structure.[7]

CONCLUSION

The judgment of the district court is reversed. The case is remanded for proceedings in accordance with this opinion.

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respect of [Allowed Insurance] Claims [beyond the policy's deductible] . . . , and to the extent possible, each holder of an affected Allowed Insured Claim shall share ratably (with all other holders of affected Allowed Insured Claims based on the allowed amount of each such Insured Claim) (a) a claim against the offset [as represented by a claim against the Trust] . . . and (b) a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefore, to the extent recovered, cash from the insurer or Club equal to such holder's ratable share." Bankruptcy Plan § 4.05.07(a)(iv).

[7] We of course make no ruling on the validity or amount of any particular claim.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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05 Civ. 2810 (NRB)
September 21, 2005, Decided
September 21, 2005, Filed

In Re: PRUDENTIAL LINES, INC.,
Debtor.

For Appellants: Alan Kellman, Maritime Asbestosis Legal Clinic, a division of The Jaques Admiralty Law Firm, P.C., Detroit, MI; Dan Shaked, Shaked & Posner, Esq., New York, NY.

For Appellee: Lawrence J. Bowles, Nourse & Bowles, LLP, New York, NY.

NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

MEMORANDUM AND ORDER

The Maritime Asbestosis Legal Clinic ("MALC"), on behalf of thousands of former merchant marine employees of Prudential Lines, Inc. ("PLI") who have filed asbestos-related bodily

injury proofs of claim (the "Asbestos Claimants") in PLI's Chapter 11 bankruptcy case, appeal from a ruling of the United States Bankruptcy Court (Gonzalez, J.) for this District denying the motion by the Asbestos Claimants and the confirmed debtor PLI's disbursement trustee (the "Trustee") seeking a ruling enforcing its interpretation of the set-off provision set forth in Section 4.05.07(a)(iv) of the Second Amended Plan of Reorganization (the "Plan") and deeming that the Trustee has received the necessary assurances and documentation noted under Plan section 4.05.07(a)(i) and is authorized to make payments of Allowed Insurance Claims. In reviewing the decision of a bankruptcy court, we "accept[ ] its factual findings unless clearly erroneous but review[ ] its conclusions of law de novo." *DG Acquisition Corp. (In re DG Acquisition Corp.*, 151 F.3d 75, 79 (2d Cir. 1998) *(citing In re McLean Industries, Inc.*, 30 F.3d 385, 387 (2d Cir. 1994). For the reasons discussed below, the Bankruptcy Court's decision is affirmed.

Because this is the most recent of several opinions issued in this case, we do not reiterate all the facts and assume familiarity with them. *See, e.g., In re Prudential Lines, Inc,* 148 B.R. 730 (Bankr. S.D.N.Y. 19921, *aff'd in part, rev'd in part on other grounds,* 170 B.R. 222 (S.D.N.Y. 1994), *aff'd,* 158 F.3d 65 (2d Cir. 1998). Instead, we note only certain facts relevant to the motion before us appealing the decision of the Bankruptcy Court. In 1986 an involuntary petition for relief seeking to place PLI in a Chapter 11 bankruptcy proceeding was not contested. On October 4, 1990 PLI's Plan of Reorganization was

confirmed. The Asbestos Claimants voted to accept the Plan.

The American Steamship Owners Mutual Protection and Indemnity Association, Inc. ("American Club") is a non-profit mutual indemnity insurance association of shipowners. Each year, the American Club's members negotiate fully assessable insurance policies (the "Policies"), under which each member is assessed an amount to cover the costs of all claims against all members arising in each separate insurance year of its membership. PLI, the predecessor of the PLI Disbursement Trust, was a shipowner member of the American Club for a number of years. When PLI declared bankruptcy in 1986, it owed the American Club $1,278,000 in premiums and assessments. The American Club filed a proof of claim which gave rise to its set-off right in that amount. The Asbestos Claimants are not parties to the Policies.

In the Plan, the Trust set aside $300,000 for use in a recycling arrangement. Pursuant to the recycling arrangement, the Trustee disbursed a damages payment to a claimant, who then returned the money to the Trustee as a non-recourse loan in exchange for a claim against the estate. The funds were then paid to the next claimant, and so on, until the Trustee had paid out $66 million in such claims. *See In re Prudential Lines, Inc,* 158 F.3d at 68-70. The United States Bankruptcy Court for the Southern District of New York held that the arrangement was legitimate, and the district court reversed. *In re Prudential Lines, Inc,* 170 B.R. at 242. The district court concluded that the recycling arrange-

ment did not satisfy the "pay first" provisions of the payment and indemnification policies, which "require the insured to first pay a claimant before the insurers' [] duty to indemnify the insured arises," because the proposed "payments" did not constitute an actual loss in good faith. 170 B.R. at 239, 242. It distinguished PLI's recycling arrangement from the arrangement in *Liman v. Am. Steamship Owners Mut. Prot. and Indem. Assns,* 299 F. Super. 106 (S.D.N.Y.), *aff'd* 417 F.2d 627 (2d Cir. 1969) (per curiam), *cert. denied,* 397 U.S. 936, 25 L. Ed. 2d 116, 90 S. Ct. 946 (1970). The *Liman* court approved of an arrangement whereby the debtor's estate paid the claims for which it would be indemnified out of the estate's funds and only "financed" the deductibles, which it was forbidden to pay because they would be illegal preferences. Here, however, the Trust lacked the funds to pay the claims and sought to finance them in their entirety, creating enormous paper losses without any expenditure of assets, and the district court emphasized this difference from *Liman* in concluding that there would be no actual loss in good faith under the recycling arrangement.

The Second Circuit affirmed, noting that it did not "think that this sham transaction triggered an indemnification obligation under New York law." *In re Prudential Lines, Inc,* 158 F.3d at 74. The Second Circuit added that its holding was "independently supported by the doctrine of New York law that bars direct actions by claimants against marine indemnity insurers." *Id.* (citing *Ahmed v. Am. Steamship Owners Mut. Prot. & Indem. Assn,* 444 F. Supp. 569, 572 (N.D. Cal.

1978)). Under the New York common law, still applicable to marine insurance policies, "the insured's lack of assets to satisfy claims against the bankrupt estate typically leaves the insured unable [to] sustain a loss and pay the claim. This is simply one consequence of purchasing a marine policy of indemnity rather than a liability policy." *Id.* at 75. The Second Circuit therefore held that it "[would] not permit the Claimants, who are the only parties in interest," to evade the bar against direct actions by claimants against marine indemnity insurers "via an illusory transaction that is of no financial consequence or interest to Prudential as the supposed insured." *Id.* at 74.

During 2004 the Trustee and Asbestos Claimants (collectively, the "Movants") filed a motion seeking a ruling from the Bankruptcy Court endorsing their interpretation of the set-off provision set out in section 4.05.07(a)(iv) of the Plan. Movants argued that section 4.05.07(a)(iv) provides that the Trustee can pay holders of allowed claims, apply the American Club's set-off ratably among them, and seek indemnification from the American Club under the Policies.[1] The

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[1] The set-off provision reads:

> Nothing in this Plan shall require Reorganized PLI or the PLI Disbursement Trust (although the PLI Disbursement Trust may do so subject to § 4.05.07 (a)(v)) to pay to any Club or insurer any cash or other consideration in respect of a Claim asserted by such Club or insurer, other than to provide such claimant, to the extent its Claim is allowed, with a Claim in the appropriate class under this Plan. To the extent there shall be a determination that amounts are due

Movants have not explicitly laid out the mechanics of the payments under their new interpretation of the Plan, but it appears that Trustee would (1) pay a claimant up to $300,000 toward his claim, less a pro-rated share of the American Club's set-off, (2) give that claimant a claim against the Trust for the amount of the claim withheld as part of the set-off, and then (3) seek indemnification from the American Club for the cash amount paid to the claimant. With its assets thus replenished, the Trustee would then repeat this process several thousand times until it had paid off all the Asbestos Claimants' millions of dollars in claims, spreading out the $1.2 million in the American Club's set-off among them ratably.

The American Club opposed the motion, arguing that it is entitled to apply its $1,278,000 set-

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and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI, Reorganized PLI, the PLI Disbursement Trust or any claimant in respect of Excess Claims (and to the extent such amounts are not otherwise offset pursuant to § 4.05.07(a)(i) of the Plan or otherwise), and to the extent possible, each holder of an affected Allowed Insured Claim shall share ratably with all other holders of affected Allowed Insured Claims based on the allowed amount of each such Insured Claim (a) a claim against the offset or recouped amount and shall receive in distribution therefor an Allowed Claim in Class 5C and (b) a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefore, to the extent recovered, cash from the insurer or Club equal to such holder's ratable share.

Plan, 4.05.07(a)(iv).

off against amounts the Trustee pays out. Under the American Club's view, the Trust must pay out an amount exceeding the American Club's set-off before the American Club is obligated to indemnify any claims against PLI.

On January 16, 2005, the Bankruptcy Court denied the motion, holding that the Plan preserved the American Club's "pay first" insurance right under the Policies, that the Movants' interpretation of the Plan "would effectively result in Claimants having a direct action against American Club, which the Second Circuit found against," and that the Trust "has not in fact incurred a 'loss' such that amount to be paid by the PLI Disbursement Trust will exceed the American Club's set-off amount." Memorandum Decision and Order, Record Item 2 ("January 19, 2005 Memorandum"), at 17. On January 26, 2005, Asbestos Claimants appealed the decision of the Bankruptcy Court.

We concur with the reasoning of the Bankruptcy Court. Under appellants' proposed pro rata scheme, as in the recycling arrangement rejected in 1992, the Trustee would sustain no actual loss incurred in good faith. Appellants' reading of section 4.05.07(a)(iv) to permit prorating of American Club's set-off among the holders of all allowed insurance claims without first requiring the Trustee to pay more than the set-off amount to those claimants would effectively grant the Asbestos Claimants a prohibited direct action against the American Club. Furthermore, the language of section 4.05.07(a)(iv) contains important qualifying language ignored by Appellants' suggested interpretation. Holders of

"Allowed Insurance Claims" are only to receive cash "to the extent recovered" and to share prorated claims "to the extent possible." The set-off provision is therefore consistent with the preservation of the American Club's legal rights as they existed as of the Plan's effective date, requiring that the Trustee "pay first" before it can seek indemnity from the American Club. We therefore affirm the decision of the Bankruptcy Court.

IT IS SO ORDERED.

Dated: New York, New York
September 21, 2005

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11
Case No. 86-B-11773 (AJG)
(Confirmed)

In re:

PRUDENTIAL LINES, INC.,

Debtor.

MEMORANDUM DECISION AND ORDER DENYING PLI DISBURSEMENT TRUSTEE'S AND CERTAIN CLAIMANTS' JOINT MOTION TO REQUIRE PRORATION OF CERTAIN INSURER'S SET-OFF RIGHT AMOUNT AGAINST THE PLI DISBURSEMENT TRUST

APPEARANCES:

JASPAN SCHLESINGER HOFFMAN LLP
Attorneys for PLI Disbursement Trustee Lee J. DiCola
300 Garden City Plaza
Garden City, New York 11530-3324

HAROLD D. JONES, ESQ.
Of Counsel

THE MARITIME ASBESTOSIS LEGAL CLINIC,
A DIVISION OF THE JAQUES
ADMIRALTY LAW FIRM, P.C.
Attorneys for Claimants
645 Griswold, Suite 1570
Detroit, Michigan 48226-4116

ALAN KELLMAN, ESQ.
Of Counsel

NOURSE & BOWLES, LLP
Attorneys for American Steamship Owners Mutual Protection and Indemnity Association, Inc.
One Exchange Plaza
At 55 Broadway
New York, New York 10006-3030

LAWRENCE J. BOWLES, ESQ.
Of Counsel

ARTHUR J. GONZALEZ
United States Bankruptcy Judge

The confirmed debtor Prudential Lines, Inc.'s ("PLI") disbursement trustee (the "PLI Disbursement Trustee") and the Maritime Asbestosis Legal Clinic, on behalf of thousands of former PLI merchant marine employees who have filed asbestos-related bodily injury proofs of claim (the "Claimants," and collectively with the PLI Disbursement Trustee, the "Movants") in PLI's chapter 11 bankruptcy case (the "PLI Chapter 11 Case"), jointly move (the "Joint Motion") (1) to require that American Steamship Owners Mutual

Protection and Indemnity Association, Inc.'s ("American Club") set-off right for its claim of $1,270,980 against the PLI Disbursement Trust (based upon PLI's unpaid premiums and assessments due for certain years that PLI was insured by American Club's marine protection and indemnity insurance policies (the "Policies")) be shared ratable among the holders of all allowed asbestos, personal injury and cargo damage claims pursuant to section 4.05.07(a)(iv) of PLI's Second Amended Joint Plan of Reorganization, as Modified (the "Plan"), which was confirmed on October 4, 1990, and (2) to deem that the PLI Disbursement Trustee has received the required satisfactory assurances and documentation and that he is authorized to make payments of allowed insured claims as provided in the third paragraph of Plan section 4.05.07(a)(i).[1] Upon consideration of the parties' filed pleadings and arguments made at the July 21, 2004 hearing regarding such joint motion, the Court denies the relief requested.

I. Jurisdiction

The Court has jurisdiction over this controversy pursuant to, among other things, subsection (c) of Article X (entitled Retention of Jurisdiction) of the Plan, which provides that "[t]he . . . Court shall retain jurisdiction over the PLI Chapter 11 Case . . . (c) to determine any and all controversies and disputes arising

[1] Familiarity with all prior decisions, orders and facts of record in the PLI Chapter 11 Case is presumed.

under or in connection with the Plan, the PLI Disbursement Trust Agreement, or any of the other agreements or instruments issued pursuant to the Plan." Plan, Art. X, § (c).

II. Discussion

A. Movants' Contentions

Movants note that American Club's claim of $1,270,980 against PLI was known and not objected to at the time of confirmation of the Plan and it is undisputed that American Club has a set-off right against the PLI Disbursement Trust for such claim. Movants assert, among other things, that the Plan specifically addresses how American Club's set-off right is to be applied. In particular, Movants maintain that Plan section 4.05.07(a)(iv) provides that holders of "Allowed Insured Claims," which by definition includes allowed asbestos, personal injury and cargo damage claims, are to "share ratably" the burden of the set-off. Movants note that Plan section 4.05.07(a)(iv) states, in pertinent part, as follows:

> To the extent there shall be a determination that amounts are due and owing from PLI to a Cub or insurer which the Club or insurer may offset or recoup against amounts due to PLI, Reorganized PLI, the PLI Disbursement Trust or any claimant in respect of Excess Claims (and to the extent such amounts are not otherwise offset pursuant to § 4.05.07(a)(i) of the Plan or otherwise), and *to the extent possible,* each holder of an affected Allowed

> Insured Claim shall share ratably (with all other holders of affected Allowed Insured Claims based on the allowed amount of each such Insured Claim) (a) a claim against the offset or recouped amount and shall receive in distribution therefor an Allowed Claim in Class 5C and (b) a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefor, *to the extent recovered,* cash from the insurer or Club equal to such holder's ratable share.

Plan, § 4.05.07(a)(iv) (emphasis added). Movants emphasize that Plan section 4.05.07(a)(iv) does not require prorating the set-off on the condition that the PLI Disbursement Trust's assets exceed American Club's set-off because prorating is not conditional; rather, the section clearly states that if there is an offset (that is, set-off) it is to be prorated. Movants also contend that the Supplemental Disclosure Statement to the Plan recognizes such proration. Moreover, Movants assert that the Plan's Definitions section provides even further support because it defines "pro rata"[2]

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[2] Plan's Definitions section defines "pro rata," in pertinent part, as follows:

> *Pro Rata* means, with respect to a Creditor in a Class 5A, 5C, or Assenting Class 6 and with respect to a particular distribution under the Plan, in the same proportion that the Allowed Claim held by such Creditor bears to the aggregate of all Allowed Claims of all Creditors in such class, subject to § 5.14 of the Plan with respect to Class 5C.

Plan, Definitions.

with respect to Class 5C Claims, which include the asbestos, personal injury and cargo damage claims. Movants clarify that the "pro rata" provision basically provides that the asbestos, personal injury and cargo damage claims will absorb the set-off in the same proportion as their claim bears to the aggregate value of all such claims.

In sum, based on the plain language of section 4.05.07(a)(iv) of the Plan, the Supplemental Disclosure Statement and the Plan's definition of "pro rata," Movants assert that the set-off is to be shared ratably and that clearly the holders of all Allowed Insured Claims, not just one or a handful, will hold claims against American Club's set-off. Movants further maintain that the concept of ratable sharing and thus a reduction to Class 5C Claimants was made clear to American Club and, therefore, the fact it did not agreed is meaningless since the Plan was approved. Indeed, Movants assert that American Club had notice and opportunity to object and appeal, yet did not do so. Additionally, Movants argue that since provision 13 of the supplemental order confirming the Plan (the "Supplemental Order") provides that the Plan is binding on "any holder of a Claim . . ." and because American Club is a holder of a claim which provided the basis of the set-off right, American Club is bound to the Plan and thereby cannot chose to selectively enforce a certain provision to the exclusion of other provisions.

In addition, Movants contend that their Joint Motion does not seek to provide the PLI Disbursement Trust with greater rights than it is entitled to and a license to avoid the "become

liable to pay" and "pay first" provisions under the Policies. Rather, the Joint Motion seeks only to enforce the set-off rights in accordance with the Plan.

In the alternative, Movants contend if the Court finds that the Plan's language is not clear, this does not change the result because ambiguous language should be construed to give effect to all purposes of the Plan. Movants assert that one of the Plan purposes included processing and paying all approved claims, whereby the $300,000 set aside in a fund was created for that specific purpose. Movants argue that American Club's position that the PLI Disbursement Trustee first use the entire $1,270,980 set-off amount against the claims first approved, paid and submitted for indemnification (based upon the "pay first" provision under the Policies as affirmed by the Second Circuit in *DiCola v. American S.S. Owners Mut. Prot. and Indem. Ass'n, Inc.* (*In re Prudential Lines, Inc.*), 158 F.3d 65 (2d Cir. 1998) (hereinafter *"Prudential Lines"*)) would result in (1) use of all of the set-aside funds whereby most of the Claimants would never be paid and thus defeat a main purpose of the Plan, and (2) effectively the PLI Disbursement Trust could no longer operate in any meaningful way.

Aside from proration of American Club's set-off amount, Movants note that the PLI Disbursement Trustee will be making payments of approved claims by using the Court approved mechanism as provided in the third paragraph of

section 4.05.07(a)(i) of the Plan.[3] Movants note that given the differences between themselves

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[3] Section 4.05.07(a)(i) of the Plan provides, in pertinent part, as follows:

> The PLI Disbursement Trustee may also take other steps as specified herein reasonably intended to obtain the benefits of insurance and to obtain reimbursement of defense costs in excess of the applicable deductible. In particular, to the extent necessary in and subject to the availability of funds for such purposes and *satisfactory assurances and documentation* as set forth below, the PLI Disbursement Trustee is authorized to enter into arrangements under which in substance the PLI Disbursement Trust pays the Allowed Insured Claim in full in cash; the holder of the Allowed Insured Claim repays in cash the full amount of the Deductible Claim and that the Club or other insurer reimburses the PLI Disbursement Trust in cash for the amount of the Excess Claim (and any previously unreimbursed defense costs in excess of the applicable deductible incurred in connection with liquidation of the Claim); and the holder of the Allowed Insured Claim is given an Allowed Claim in Class 5C in the amount of the Deductible Claim. The PLI Disbursement Trustee shall enter into no such arrangement and shall make payment of no such Claim unless it obtains *satisfactory assurances and documentation* that the PLI Disbursement Trust shall promptly receive in cash repayment and/or reimbursement of the full amount of the Allowed Insured Claim paid by the PLI Disbursement Trust such that the entire amount paid by the PLI Disbursement Trust shall remain available to the PLI Disbursement Trust. The PLI Disbursement Trustee may alternatively enter into any lawful arrangement designed to achieve the same purpose, as may be agreed upon by the holder of an Allowed Insured Claim and the PLI Disbursement Trustee, but in connection with such an arrangement

and American Club, it is unlikely that, assuming that the Court rules in Movants' favor on pro-rating set-off amount, that American Club will provide the assurances and documentation called for under the Plan and, in fact, the Plan does not address who shall provide such assurances and documentation. Movants content that the PLI Disbursement Trustee will be in full compliance with his duties and responsibilities in the event he pays Allowed Insured Claims by following the detailed approach outlined in Plan section 4.05.07(a)(i). Movants assert that in order to protect the PLI Disbursement Trustee from any charge or allegation of not carrying out his duties as required, there should be a finding that the PLI Disbursement Trustee, by following the terms of the approved Plan, is deemed to have received the necessary assurances and documentation noted under Plan section 4.05.07(a)(i).

Movants also assert that the Claimants have not initiated a direct action against, and do not seek direct payment from, American Club as prohibited in *Prudential Lines*, 158 F.3d at 74. Rather, Movants maintain that the PLI Disbursement Trustee will pay allowed claims and seek indemnification of claims paid from American Club whereby no direct action or contact

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> may not use funds of the PLI Disbursement Trust, as set forth below, unless *adequate assurances and documentation* are provided ensuring that the PLI Disbursement Trust will promptly receive repayment and/or reimbursement of all amounts paid by the PLI Disbursement Trust.

Plan, § 4.05.07(a)(i) (emphasis added).

would result between the Claimants and American Club.

B. *American Club's Contentions*

In response, American Club first argues that Movants deliberately misinterpret the Plan and applicable law so as to enable the PLI Disbursement Trustee to, in effect, force direct payments by the American Club to the various Claimants far beyond the PLI Disbursement Trust's liability and without the PLI Disbursement Trust having first paid those Claimants an amount sufficient to exceed the Club's $1,270,980 set-off amount. American Club notes that Movants' baseless interpretation of the Plan would give the PLI Disbursement Trust new contract rights under the Policies, while eliminating existing rights of American Club and, therefore, for this reason alone the Joint Motion should be denied. In support of its contention, American Club notes that (1) Plan section 4.05.07(a)(i),[4] section 1.1(e) of Article 1 of the PLI Disbursement Trust Agree-

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[4] American Club notes that Plan section 4.05.07(a)(i) provides, in pertinent part, as follows:

> Subject to the remainder of this § 4.05.07(a) of the Plan and the terms of the PLI Disbursement Trust Agreement, the PLI Disbursement Trust will succeed to all insurance rights of PLI in existence as of the Effective Date, including any rights to indemnification . . . or other payment in respect of any . . . Claim and any other such rights PLI may have to receive payment from . . . from any Club or other insurer . . . .

Plan, § 4.05.07(a)(i).

ment[5] and the Supplemental Disclosure Statement[6] all limit PLI's insurance rights, which were succeeded to by the PLI Disbursement Trust, to those existing as of the Effective Date of the Plan, and (2) nothing in the Supplemental Order purports to or could modify the rights of either PLI or American Club under the Policies. American Club further notes that the bankruptcy court in *Prudential Lines* recognized that the Plan does not alter American Club's contractual obligations.[7]

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[5] American Club notes that Article 1, section 1.1(e) of the PLI Disbursement Trust Agreement provides, in pertinent part, as follows:

> "Insurance Rights" means any and all rights, contractual or otherwise, of PLI existing as of the Effective Date under or with respect to any policy issued by, or arrangement with, any insurer or insurance club, insofar as the PLI Disbursement Trust may succeed to such rights . . . all as more fully set forth in § 4.05.07(a)(i) of the Plan . . . .

PLI Disbursement Trust Agreement, Art. 1, § 1.1(e).

[6] American Club notes that the Supplemental Disclosure Statement provides, in pertinent part, as follows:

> Subject to the PLI Disbursement Trust Agreement, the PLI Disbursement Trust will succeed to all of PLI's insurance rights in existence as of the Effective Date . . . including such rights to indemnification . . . .

Supplemental Disclosure Statement, at 34.

[7] Specifically, American Club notes that *inDiCola v. American Steamship Owners Mutual Protection and Indemnification Assoc., Inc. (In re Prudential Lines, Inc.)*, 148 B.R. 730 (Bankr. S.D.N.Y. 1992), the bankruptcy court stated as follows:

(*footnote continued*)

American Club also asserts that before the PLI Disbursement Trust can seek to be indemnified or reimbursed from American Club, the PLI Disbursement Trust is obligated to establish that it has become liable to pay and has paid each claim for which indemnification or reimbursement is sought. Citing *DiCola v. American S.S. Owners Mut. Prot. and Indem. Assn, Inc. (In re Prudential Lines, Inc)*, 148 B.R. 730, 748-49 (Bankr. S.D.N.Y. 1992), *aff'd in part, rev'd in part on other grounds*, 170 B.R. 122, 239 (S.D.N.Y. 1994), *aff'd*, 158 F.3d 65, 75 (2d Cir. 1998), American Club notes that court decisions in the PLI Chapter 11 Case have repeatedly and expressly enforced the "shall pay" or "pay first" (or "pay-to-be-paid") provisions of the Policies, that is, until the PLI Disbursement Trust pays out more than the $1,270,980 set-off amount, the PLI Disbursement Trust has no right to seek indemnification or reimbursement from American Club. As to the "become liable to pay" provision, American Club also asserts, among other things, that under Movants' proposed pro rata scheme, the PLI Disbursement Trustee would still sustain no actual loss incurred in good faith so as to trigger an indemnification obligation under New York law.

> In substance, these provisions provide that the Trustee shall succeed to PLI's rights in the PLI policies, but only to those rights PLI already had as of the effective date of a valid insurance policy. . . . Thus, we hold that the Plan does not alter Club's contractual obligations as they exist under the P & I policies and applicable law.

Id. at 748.

Additionally, American Club contends that since it is undisputed that it has a confirmed right to set-off its claim for $1,270,980 for unpaid premiums and assessments against the PLI Disbursement Trust's claims, and because such set-off amount far exceeds the Trust's assets totaling approximately $300,000 and is even less after payment of deferred administrative expenses, the PLI Disbursement Trust cannot pay enough to the Claimants to overcome the set-off and, thereby, the Joint Motion should be denied.

American Club also asserts that granting the Joint Motion, that is, prorating American Club's set-off among holders of all Allowed Insured Claims without requiring the PLI Disbursement Trust to first pay more than the $1,270,980 to those Claimants, would in effect be granting those Claimants a right of direct action against American Club, which is prohibited by the Second Circuit's *Prudential Lines* holding. *See Prudential Lines,* 158 F.3d at 74.

Further, American Club argues that the Joint Motion contravenes the actual terms of the Plan. To place the matter in context, American Club notes that in or about August 1990, at the time the PLI Disbursement Trust Agreement, Supplemental Disclosure Statement and Plan were drafted, there was uncertainty as to (1) whether American Club could be held liable to the PLI Disbursement Trust, at all, and (2) if so, whether the PLI Disbursement Trust would have cash to fund settlements in an amount sufficient to exceed whatever amount American Club would claim as a set-off. American Club notes that the Supplemental Disclosure provides that "it is pos-

sible that American Club's net Claim against PLI could exceed $200,000 . . . ." Supplemental Disclosure Statement, at 36. American Club claims that given this uncertainty, the Plan was designed to cover both eventualities.

American Club specifically notes that the Supplemental Disclosure Statement language recognized, in pertinent part, the possibility that American Club might have no liability to the PLI Disbursement Trust and, if so, provided that the Claimants could then receive only Class 5C Claims against the PLI Disbursement Trust's assets.[8] Further, American Club points out that Plan section 4.05.07(a)(ii) recognizes the same contingency [9] and Plan section 4.05.03 makes a similar point.

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[8] American Club notes that the Supplemental Disclosure Statement provides, in pertinent part, as follows:

> The Modified Plan, like the Original Plan, provides that to the extent there is a determination that a Club or other insurer is not liable for or cannot be required to make payment in respect of Excess Claims, the holder of the Claim shall be entitled (unless the claimant agrees otherwise) to a Class 5C Claim in the full amount of the Allowed Personal Injury Claim or Allowed Cargo Damage Claim. The holder of such a Claim will have no other right against the PLI Disbursement Trust, Reorganized PLI, . . . or any of the other Companies.

Supplemental Disclosure Statement, at 37.

[9] American Club notes that Plan section 4.05.07(a)(ii) provides, in pertinent part, as follows:

> Notwithstanding any provision of the Plan, to the extent that there is a determination that a Club or other insurer is not liable for or cannot be required to make payment in respect of a potential Excess

On the other hand, American Club notes that Plan section 4.05.07(a)(iv) contemplates the possibility where the PLI Disbursement Trust's assets might exceed American Club's set-off. American Club asserts that only in such instance, while putting aside American Club's other defenses, if the PLI Disbursement Trust's assets were sufficient to exceed American Club's set-off and were not "otherwise offset," then "to the extent possible" and "to the extent recovered," the amount of any set-off would be prorated among all holders of affected Allowed Insured Claims and, thus, avoid the situation in which holders of some Allowed Insured Claims would absorb the full amount of any set-off. To simply accept Movants' contention that, no matter what, the Claimants have to share ratably the set-off (1) would make Plan sections 4.05.03 and 4.05.07(a)(ii) meaningless, and (2) Plan section 4.05.07(a)(iv) would not contain any of its presents qualifiers, that is, "to the extent such amounts are not other offset," "to the extent possible," and "to the extent recovered."

C. *Analysis*

A plan of reorganization is similar in nature to a contract and is generally interpreted in accor-

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> Claim, the holder of such a Claim shall have . . . no right against the PLI Disbursement Trust . . . except the right to be granted (unless such holder agrees to accept a Class 5C Claim in a lesser amount) a Class 5C Claim equal to the full amount of the Allowed Personal Injury Claim or Allowed Cargo Damage Claim.

Plan, § 4.05.07(a)(ii).

dance with the contract law principles of the state in which the plan of reorganization was confirmed. *See C.F. Brookside, Ltd. v. Skyview Memorial Lawn Cemetery (In re Affordable Hous. Dev. Corp),* 175 B.R 324, 329 (B.A.P. 9th Cir. 1994) ("Like a consent decree, a chapter 11 plan has elements of both a judgment and a contract. Because of a plan's likeness to a consent decree, a chapter 11 plan should generally be interpreted as if it were a contract. The law of the state in which the plan was confirmed governs its interpretation.") (citations omitted); *In re L & V Realty Corp.*, 76 B.R. 35 (Bankr. E.D.N.Y. 1987) ("In many respects a plan is in the nature of a contract."); *In re UNR Industries, Inc.*, 1996 Bankr. LEXIS 1455, at * 6 (N.D. Ill. 1996) ("In general, a plan of reorganization should be analyzed according to principles of state contract law.").

Under New York law, that is, the state in which the Plan was confirmed, "it is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." *Morlee Sales Corp. v. Mfr. Trust Co.*, 9 N.Y.2d 16, 19 (N.Y. 1961) (citing *Green v. Doniger,* 300 N.Y. 238 (N.Y. 1949); *Hartigan v. Cas. Co. of America,* 227 N.Y. 175 (N.Y. 1919). A court "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Morlee*, 9 N.Y.2d at 19 (citations and quotation marks omitted). "Evidence outside of the four corners of the document as to what was really intended by unstated or mis-

stated is generally inadmissible to add to or vary the writing." *W.W.W. Assocs. v. Giancontieri,* 566 N.E.2d 639, 642 (N.Y. 1990).

A court may consider extrinsic evidence of the parties' intent if the contract is ambiguous, but "such evidence may not be used to vary or contradict the language of the contract, but only to interpret it so as to resolve the ambiguity." *Computer Assocs. Int'l v. U.S. Balloon Mfr. Co., Inc.,* 782 N.Y.S.2d 117,118 (noting same). In determining the existence of an ambiguity, the New York Court of Appeals noted as follows:

> Where an agreement is ambiguous is a question of law for the courts. Ambiguity is determined by looking within the four corners of the document, not to outside sources. An in deciding whether an agreement is ambiguous[,] courts
>
> > should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought.
>
> Where the document makes clear the parties' over-all intention, courts examining isolated provisions should then choose that construction which will carry out the plain purpose and object of the [agreement].

Kass v. Kass, 696 N.E.2d 174, 180-81 (N.Y. 1998) (citations and quotation marks omitted).

Plan section 4.05.07(a)(iv) provides two qualifiers to proration, that is, "to the extent possible" and "to the extent recovered." Therefore, contrary to Movants' contentions, the section does not require American Club to make payments prior to the satisfaction of its set-off right

Further, the Court finds that such qualifiers are not ambiguous when analyzed within the four corners of the Plan. When reviewing the qualifiers in the context of the parties obligations as a whole under the Plan, that is, not isolated under Plan section 4.05.07(a)(iv), the Plan preserved the Policies' indemnity requirement that the PLI Disbursement Trust incur a loss in good faith prior to indemnification by American Club. Plan section 4.05.07(a)(i) specifically provides that "the PLI Disbursement Trust will succeed to all insurance rights of PLI . . . in existence as of the Effective Date, including any such rights to indemnification . . . ," and the Plan does not show that American Club has waived such insurance rights. Thus, under the Plan, the PLI Disbursement Trust must still satisfy, among other things, the "shall pay" (that is, "pay-to-be-paid" or "pay first's provision under the Policies requiring the PLI Disbursement Trust to incur a loss prior to proration of American Club's set-off.[10]

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[10] Even if Plan section 4.05.07(a)(iv)'s qualifying language was deemed ambiguous and thus extrinsic evidence were permissible, the Court would find that the Supplemental Disclosure Statement provides similar support of American Club's preservation of its pay-first insurance right

Indeed, this is the same conclusion reached by the Second Circuit in *Prudential Lines*. In

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under the Policies. In particular, the Supplemental Disclosure Statement notes, in pertinent part, as follows:

> Moreover, it appears the Debtor may owe monies to the American Club in respect of unpaid assessments and premiums and possibly other matters relating to certain policy years. In August 1989, the American Club filed a second amended proof of claim in the PLI Chapter 11 Case for approximately $2.5 million. The extent of American Club's Claim may be disputed and it may, in turn, owe PLI certain amounts in refunds of premiums and for reimbursement of certain losses incurred by PLI before the Effective Date . . . . Under the Modified Plan, in order to try to preserve insurance coverage, the PLI Disbursement Trust will be authorized (to the extent permitted under applicable law) to set[-]off such amounts owed to PLI against American Club's Claim. Nevertheless, it is possible that, after adjustment of the various amounts owing, the American Club may have a substantial net Claim against PLI, and the American Club has taken the position that until any net amount owed to it by PLI is satisfied it will not make cash payments in respect of any Claims.
>
> . . .
>
> [I]t is contemplated under the Modified Plan, as under the Original Plan, that to the extent possible consistent with applicable law monies owed to a Club may be offset by reducing the amounts that the Club would otherwise have to pay in respect of Excess Claims. Thus, the Modified Plan provides that to the extent amounts are owing from PLI to a Club which the Club can offset or recoup against amounts due to PLI (and to the extent the amounts are not otherwise offset), and to the extent possible, each holder of an affected Allowed Insured Claim will share ratably a Class 5C Claim equal to the offset or recouped amount (as well as a Class 5C Claim equal to the

reviewing the $300,000 set aside to fund the Plan's recycling arrangement that could be used for settling claims, the Second Circuit in *Prudential Lines* agreed with the district court's "conclusion that the recycling arrangement did not amount to payment under American Club's policy and thus failed to satisfy the policy's pay first provision," *Prudential Lines,* 158 F.3d at 72, and reasoned as follows:

> The American Club policies require it to "indemnify [Prudential] against any loss, damage or expense which [Prudential] shall become liable to pay and shall pay." Because the American Club policy mandates payment prior to triggering the insurer's indemnification obligations, it is an indemnity policy.
>
> . . . .
>
> *Liman* summarized New York law on what constitutes payment under an indemnity policy . . . : "The test in New York is whether the assured has actually in good faith sustained the loss for which reimbursement is sought, and the insurer's obligation to indemnify may not be avoided because of the assured's insolvency." Thus, an indemnifiable payment entails (i) satisfaction of the claim and (ii) the absorption of some loss thereby by the insured, (iii) both in good faith.

> Deductible Claim). As a result, the cash payments that otherwise might be obtained from the American Club in respect of certain Excess Claims may be reduced. The American Club has to date not agreed to such a procedure.

Supplemental Disclosure Statement, at 36.

. . . .

> Here, Prudential seeks to use the recycling arrangement to finance the whole of the claims, not the deductibles alone. This case thus differs from *Liman* in the essential respect that indemnity is sought for a loss that the policyholder has not incurred.

Id. (quoting *Liman v. American S.S. Owners Mut. Prot. and Indem. Ass 'n,* 299 F. Supp. 106, 109 (S.D.N.Y.), *aff'd per curiam,* 417 F.2d 627 (2d Cir. 1969)).

As to Movants' assertion that if the $300,000 set aside in the fund had to "may first" to incur a loss, the end result would defeat the Plan's purpose of settling individual claims and effectively render the PLI Disbursement Trust meaningless, the Court finds that this assertion is unpersuasive. Plan section 4.05.07(a)(i) contemplated that the recycling arrangement[11] would be acceptable and thereby the PLI Disbursement Trust would be able to satisfy the loss provisions under the

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[11] In *Prudential Lines,* the Second Circuit described the recycling arrangement as follows:

> The American Club policies contain a pay first provision requiring that Prudential pay any claims prior to seeking indemnification from American Club. However, bankrupt Prudential lacks the funds to pay the claims. In an effort to satisfy the Claimants and the pay first provision, the reorganization plan set aside $300,000 for use in a recycling arrangement: seriatim, the Trustee disbursed a damages payment to each Claimant, who then returned the money to the Trustee as a non-recourse loan so that it would be on hand to pay the next Claimant, and so on.

Prudential Lines, 158 F.3d at 67-68.

Policies and thus ratably apply the set-off amount. However, after confirmation of the Plan, the Second Circuit in *Prudential Lines* addressed the recycling arrangement under the Plan and found that it was a "sham transaction" because it did not "trigger an indemnification obligation under New York law." *See Prudential Lines*, 158 F.3d at 74. The Court finds that to now enable the Claimants to use the recycling scheme as proposed herein would effectively give the Claimants, as American Club correctly points out, a direct action against American Club, which the Second Circuit similarly did not permit in *Prudential Lines*.[12] *See id.*

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[12] The Second Circuit specifically noted as follows in *Prudential Lines* regarding direct actions by Claimants against marine indemnity insurers:

> It is obvious for reasons previously stated that the Claimants are the only parties with an interest in the indemnification from American Club. Our holding is therefore independently supported by the doctrine of New York law that bars direct actions by claimants against marine indemnity insurers. Although New York has broadly altered this common law rule by statute, the statute expressly preserves application of the common law rule to marine insurance contracts, such as P&I policies. "The exception was consciously made by the New York legislature to eliminate a perceived competitive disadvantage to which New York's marine insurers were placed by the direct action statute."
>
> We have previously barred a suit by an insured's judgment creditor against a marine policy on the ground that the suit closely resembled a direct action. We will not permit the Claimants, who are the only parties in interest, to evade this bar via an illusory transaction that is of no financial conse-

III. *Conclusion*

Since (1) Plan section 4.05.07(a)(i) preserved American Club's pertinent "pay first" insurance right under the Policies, which is consistent with Plan section 4.05.07(a)(iv)'s qualifiers to prora-

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quence or interest to Prudential as the supposed insured.

New York's approach to insolvent insureds under the common law rule barring direct actions is quite categorical and firm in terms of the type of actual loss required to trigger an indemnification obligation:

> If the insured was insolvent, so that the person injured or the estate of one killed was unable to satisfy the judgment against him, the insurer in effect would be released. The policy being one of indemnity against loss suffered by the principal, it followed that the insured having suffered no damage, there was no loss for the insurer to indemnify.

Thus, as the law stood under New York common law —and as it still stands in relation to marine insurance policies—the insured's lack of assets to satisfy claims against the bankrupt estate typically leaves the insured unable sustain a loss and pay the claim. This is simply one consequence of purchasing a marine policy of indemnity rather than a liability policy.

Prudential Lines, 158 F.3d at 74-75 (citations omitted); *see generally* 3B-XVI BENEDICT ON ADMIRALTY § 71 (Problems With Shipowner Reorganizations) (2004) (noting that the financial inability to meet indemnity insurance policy requirements, such as a "pay first" provision which requires the shipowner to fund the judgment and seek reimbursement from the marine indemnity insurer, "renders such insurances unavailable as an asset of the bankruptcy estate . . . except in 'direct action' states where the seamen can directly proceed against the insurer.") (citations omitted).

tion, (2) Movants' interpretation of the Plan herein would effectively result in Claimants having a direct action against American Club, which the Second Circuit found against in *Prudential Lines*, and (3) the PLI Disbursement Trust has not in fact incurred a "loss" such that amounts to be paid by the PLI Disbursement Trust will exceed American Club's set-off amount, the Court finds that Movants have failed to demonstrate that American Club's applicable set-off amount against PLI Disbursement Trust should be shared ratably among the holders of all allowed asbestos, personal injury and cargo damage claims under Plan section 4.05.07(a)(iv) in a manner that would require, absent consent, payment by American Club prior to it being obligated to make such payment under the Policies.

Therefore, for the reasons set forth herein, it is hereby:

ORDERED, that Movants' Joint Motion is denied in its entirety.

Dated: January 19, 2004
New York, New York

s/ Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

[LETTERHEAD OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT]

No. 05-5925-bk
Filed September 2, 2008

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of September two thousand and eight,

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IN RE: PRUDENTIAL LINES, INC.,

Debtor.

ASBESTOSIS CLAIMANTS,

Claimants-Appellants,

—v.—

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION and INDEMNITY ASSOCIATION, INC.,

Appellee.

ORDER

American Steamship Owners Mutual Protection and Indemntiy Association, Inc. having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: FRANK PEREZ
Frank Perez, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 05-5925-bk
Filed June 19, 2008

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19th day of June, two thousand eight,

Before: Hon. Roger J. Miner,
Hon. Pierre N. Leval,
Hon. Rosemary S. Pooler,
Circuit Judges.

IN RE: PRUDENTIAL LINES, INC.,
Debtor.

ASBESTOSIS CLAIMANTS,
Claimants-Appellants,

—v.—

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION and INDEMNITY ASSOCIATION, INC.,
Appellee.

JUDGMENT

Appeal from the United States District for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION THEREOF, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of the district court is REVERSED. The case is REMANDED for proceedings in accordance with the opinion of this court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk
by

JOY FALLEK
Joy Fallek
Administrative Attorney

A True Copy
Catherine O'Hagan Wolfe, Clerk

by MARIA RODRIGUEZ
Deputy Clerk

Mandate: September 15, 2008 MR

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In a Proceeding for a Reorganization
under Chapter 11

Case No. 86-B-11773 (HCB)

In re
PRUDENTIAL LINES, INC.,

Debtor.

EXTRACTS FROM

SECOND AMENDED JOINT PLAN OF REORGANIZATION, AS MODIFIED, PROPOSED BY THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, COLD SPRING SHIPPING. L.P., AND VESSEL CHARTERS, INC.

The Official Committee of Unsecured Creditors, Cold Spring Shipping, L.P., and Vessel Charters, Inc. propose the following Modified Plan of Reorganization pursuant to Sections 1121(c) and 1127 of the Bankruptcy Code.

ARTICLE I
DEFINITIONS

For the purposes of this Plan, the following terms shall have the meanings set forth below. Unless otherwise indicated, the singular shall include the plural and pronouns of one gender shall include both genders.

* * *

Asbestos Claim means a Personal Injury Claim based on exposure to asbestos.

* * *

Available Cash means, with respect to a particular entity, for any period commencing on the first day after the date of the last calculation of Available Cash (or, with respect to the first calculation, commencing on the Modification Date) and ending on such date as is specified in the pertinent provision of the Plan for calculation of Available Cash:

The sum of (1) all cash receipts of such entity during such period from any sources (including, without limitation, cash received from operations or sale of assets; net investment income; dividends; and, in the case of the PLI Disbursement Trust, cash received in respect of the VCI Note, the Egyptian Litigation, or any of the other assets and powers granted or transferred to the PLI Disbursement Trust or the PLI Disbursement Trustee pursuant to § 6.04 of the Plan) as well as, with respect to the first calculation of Available Cash, any cash on hand at the beginning of the Modification Date and (2) the aggregate reduction (if any) in the amount of Reserves

of the entity during such period, minus the sum of (3) all cash disbursements during such period by such entity (including, without limitation, cash disbursements for operating and administrative expenses and capital expenditures and, with respect to Reorganized PLI and the first calculation of Available Cash, cash transferred to the PLI Disbursement Trust pursuant to § 6.04 of the Plan) and (4) the aggregate addition (if any) in the amount of Reserves of the entity during such period (including with respect to the first calculation of Available Cash, the initial Reserves that are established); provided, however, that Available Cash with respect to the PLI Disbursement Trust shall not include (a) the Insurance Preservation and Claims Liquidation Funds or the Liman Funds (and no subtraction from Available Cash shall be made for any such funds expended or disbursed by the PLI Disbursement Trust in accordance with the Plan), or (b) any cash held in escrow or reserve by the PLI Disbursement Trust for potential Allowed Late-Filed Asbestos Claims, Disputed Claims or for holders of Allowed Claims in respect of which there are unclaimed distributions in accordance with §§ 4.05.07(b), 8.02, and 6.09 of the Plan, or otherwise for payment of Claims in Classes 1 or 2 (other than Deferred Administrative Claims or Deferred Priority Claims) or Classes 3 or 4 (and no subtraction from Available Cash shall be made for any such cash paid to holders of such Claims), and provided, further, that the calculation of Available Cash with respect to Shipco and Reorganized PLI shall be subject to § 6.18 of the Plan.

* * *

Claim means any right to payment from the Debtor, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or any right to an equitable remedy for breach of performance, if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Club means each of the marine protection and indemnity mutual associations of which the Debtor or a Predecessor Company was or is a member in respect of a vessel owned, operated, managed, chartered, or mortgaged by the Debtor or a Predecessor Company.

Cold Spring means Cold Spring Shipping, L.P., a limited partnership organized under the laws of Delaware.

* * *

Creditors' Committee means the Official Committee of Unsecured creditors appointed in the PLI Chapter 11 Case on January 28, 1987, by the United States Trustee for the Southern District of New York, as it may be constituted from time to time.

* * *

Debtor means PLI.

Deductible Claim means (a) with respect to an Allowed Personal Injury Claim that is an Allowed Insured Claim, that portion of the Claim equal in

amount to the lesser of (i) the deductible provided in the relevant insurance policy or Club coverage and (ii) the Allowed Personal Injury Claim, or (b) with respect to an Allowed Cargo Damage Claim that is an Allowed Insured Claim, the claimant's ratable share of the deductible for the voyage or voyage leg provided in the relevant insurance policy or Club coverage as set forth in § 4.05.07(a)(iii) of this Plan.

* * *

Deferred Priority Claim means a Class 2 Claim, the holder of which is to receive distributions on a deferred basis, after payment in full of all Deferred Administrative Claims, from Available Cash of the PLI Disbursement Trust as provided in §§ 4.02 and 4.02.01 of the Plan. Subject to § 4.02.01 of the Plan, each Deferred Priority Claim shall equal the entire allowed amount of the holder's Class 2 Claim (after taking account of any reduction in such a Claim agreed to as part of a Priority Claims Settlement) minus any payments thereof (other than interest payments) made by Reorganized PLI prior to or as of the Modification Date.

* * *

Excess Claim means that portion, if any, of any Allowed Insured Claim that exceeds the Deductible Claim.

* * *

Insured Claims means those Personal Injury Claims (including Allowed Late-Filed Asbestos Claims and other Asbestos Claims) and Cargo Damage Claims for which there is coverage under one or more policies of marine protection and

indemnity coverage or other insurance under which the Debtor or a Predecessor Company is or was an insured; provided, however, that Insured Claims shall not include any Cargo Damage Claims that are in Class 4.

Insurance Preservation and Claims Liquidation Funds means $200,000 to be transferred by Reorganized PLI to the PLI Disbursement Trust pursuant to § 6.04 of the Plan (plus any net income earned by the PLI Disbursement Trust through the investment of such funds pursuant to the PLI Disbursement Trust Agreement), which funds the PLI Disbursement Trust shall use for the purposes and pursuant to the terms specified in § 4.05.07(a)(v) of the Plan.

* * *

Liman Funds means $300,000 to be transferred by Reorganized PLI to the PLI Disbursement Trust pursuant to § 6.04 of the Plan, which funds the PLI Disbursement Trust shall use for the purposes and pursuant to the terms specified in § 4.05.07(a) of the Plan.

Litigation Funding Commitment means the commitment of HBT to make advances, provide reimbursement, or pay expenses up to an aggregate of $200,000 and, in its discretion, beyond that amount to finance the legal fees and other charges and expenses incurred on or after the Effective Date by or on behalf of Reorganized PLI (to the extent that Reorganized PLI otherwise has inadequate reserves or capital) and Cold Spring in connection with (1) the case commenced in Bankruptcy Court entitled *The Official Committee of Unsecured Creditors et al. v.*

PSS Steamship Co., Adv. Pro. No. 89-6430A, on appeal and cross-appeal, 90 Civ. 1262 — 1263 (U.S. Dist. Ct. S.D.N.Y.), (2) the case commenced in Bankruptcy Court entitled *Prudential Lines. Inc.. et al.. v. Arthur Gray. Jr., et al.*, Adv. Pro. No. 90-5911A, or (3) other related legal efforts; provided, however, that if Cold Spring obtains a monetary recovery by judgment or settlement in respect of the case referenced in item (2) above, it shall be responsible up to the amount of its recovery for a ratable share of the legal fees and expenses incurred by or on behalf of Reorganized PLI and Cold Spring in that case (and such ratable share of such legal fees and expenses shall not be subject to the Litigation Funding Commitment), such ratable share to be in the same proportion to all legal fees and expenses incurred by or on behalf of Reorganized PLI and Cold Spring in that case as Cold Spring's recovery in that case is to the recovery of Cold Spring and Reorganized PLI combined, and provided, further, that if following a trial in the case referenced in item (2) above, judgment is entered providing no monetary recovery to either Cold Spring or Reorganized PLI, Cold Spring shall be responsible for fifty percent of the legal fees and expenses incurred by or on behalf of Reorganized PLI and Cold Spring in that case (and this percentage of such legal fees and expenses shall not be subject to the Litigation Funding Commitment). Any settlement of the case referenced in item (2) above shall be on notice to the Creditors' Committee.

* * *

PLI means Prudential Lines, Inc., a Delaware corporation, which is the Debtor in the PLI Chapter 11 Case.

PLI Chapter 11 Case means the case commenced in the Bankruptcy Court against PLI on September 12, 1986, to which PLI consented on November 4, 1986, seeking relief under Chapter 11 of the Bankruptcy Code.

PLI Disbursement Trust means the trust created pursuant to § 6.00 of this Plan and the PLI Disbursement Trust Agreement.

PLI Disbursement Trust Agreement means the agreement specifying the rights and obligations of the PLI Disbursement Trust and the PLI Disbursement Trustee, which agreement shall be substantially in the form of Exhibit E.

PLI Disbursement Trustee means the person or entity who will serve as trustee for the PLI Disbursement Trust.

* * *

Pro Rata means, with respect to a Creditor in Class 5A, 5C, or Assenting Class 6 and with respect to a particular distribution under the Plan, in the same proportion that the Allowed Claim held by such Creditor bears to the aggregate of all Allowed Claims of all Creditors in such class, subject to § 5.14 of the Plan with respect to Class 5C. With respect to a holder of a Deferred Administrative Claim or a holder of a Deferred Priority Claim and (subject to § 8.02(a) of the Plan) with respect to a particular distribution of Available Cash of the PLI Disbursement Trust, Pro Rata means in the same

proportion that the particular Deferred Administrative Claim or Deferred Priority Claim bears to the aggregate of all Deferred Administrative Claims or Deferred Priority Claims as the case may be.

* * *

ARTICLE II
DESIGNATION OF CLASSES OF CLAIMS AND INTEREST

The Allowed Claims and the Allowed Interest are classified into the following classes:

* * *

2.07 *Class 5C.* Class 5C shall consist of all Allowed Unsecured Claims other than those in Class 4, Class 5A, Class 5B, or Class 6.

* * *

ARTICLE III
SPECIFICATION OF CLAIMS AND INTEREST IMPAIRED AND UNIMPAIRED UNDER THE PLAN

3.01 *Claims.* Classes 1, 2, and 3 are unimpaired under the Plan. Classes 4, 5A, 5B, 5C, and 6 are impaired under the Plan.

* * *

ARTICLE IV
TREATMENT OF CLASSES

* * *

4.05.03 *Class 5C.* Each holder of a Class 5C Claim, subject to §§ 5.01, 5.15, and 6.01c of this Plan, shall receive:

(i) its Pro Rata share of any VCI Stock Net Sale Proceeds (or other proceeds) distributed by the VCI Stock Escrow Agent in accordance with § 6.01c of the Plan; and

(ii) after payment in full of all Deferred Administrative Claims and all Deferred Priority Claims, its Pro Rata share of a percentage (calculated in accordance with and subject to § 4.05.04(b) of the Plan) of any further distributions of Available Cash of the PLI Disbursement Trust.

In addition, subject to possible defenses to payment Clubs or other insurers may have, holders of Insured Claims in Class 5C, including holders of Allowed Late-Filed Asbestos Claims, may be entitled to payment in cash of Excess Claims, directly or indirectly, from Clubs or other insurers. As set forth in § 4.05.07(a) of the Plan, $200,000 shall be set aside by the PLI Disbursement Trust in order to attempt to preserve insurance rights and to provide funds for the liquidation of Personal Injury Claims and Cargo Damage Claims and an additional $300,000 shall be set aside in Liman Funds. If the Bankruptcy Court determines that additional consideration must be afforded to holders of Class 5C Claims in

order to confirm the Plan, then the Proponents may jointly provide for such additional consideration, subject to the approval of the Bankruptcy Court. The additional consideration may reduce the distributions to Class 5A, Cold Spring, and/or Assenting Class 6. Any additional consideration given to Class 5C, as provided above, and any reduction in distributions to Class 5A, Cold Spring and/or Assenting Class 6, shall be subject to Bankruptcy Court approval.

* * *

4.05.04 *Distributions of Available Cash of the PLI Disbursement Trust.*

* * *

(b) To the extent that there is Available Cash of the PLI Distribution Trust for distribution after all Deferred Administrative Claims and all Deferred Priority Claims have been paid in full, the PLI Disbursement Trustee shall, before making each such distribution (unless the Bankruptcy Court orders otherwise), provide at least 20-days written notice of the intended distribution to the Creditors' Committee the Asbestos Creditors' Committee, and all Creditors who have requested notice pursuant to Bankruptcy Rule 2002. Unless such a committee or Creditor files with the Bankruptcy Court and serves on the PLI Disbursement Trustee and all other committees and Creditors entitled to notice of the intended distribution, prior to the proposed distribution date, a motion requesting that a disproportionately large percentage of the distribution be allocated to Class 5C, the PLI Disbursement Trustee shall allocate such Available

Cash among Classes 5A, 5B, 5C and 6 based on such class' proportionate share of the total amount of Allowed Claims in Classes 5A, 5B, 5C and 6, except that Cold Spring's proportionate share, subject to § 4.06 of this Plan, shall be calculated taking into account the entire amount of Allowed Claims in both Class 5B and Class 6 (with Creditors classified in Class 6 to receive no proportionate share unless Class 6 votes for the Plan in which case such Creditors shall obtain a share calculated in accordance with § 4.06 of the Plan). If such a motion is timely filed and served, the Bankruptcy Court shall hold a hearing at the conclusion of which it may direct that a disproportionately large percentage (up to 100%) of the distribution shall be allocated to Class 5C if necessary in order to provide Class 5C with treatment that is sustantially equal (after taking into account the aggregate amount of Allowed Claims in each such class) to that provided under the Plan in respect of Classes 5A, 5B, and 6. To the extent that the Bankruptcy Court does so direct, it shall also direct that the percentage of the distribution allocated in respect of each of Classes 5A, 5B and 6 shall be proportionately reduced.

* * *

4.05.07 *Treatment of Certain Claimants.*

(a) *Allowed Insured Claims*:

(i) Subject to the remainder of this § 4.05.07(a) of the Plan and the terms of the PLI Disbursement Trust Agreement, the PLI Disbursement Trust will succeed to all insurance rights of PLI (but not to any insurance rights of VCI) in existence as of the Effective Date, including any such

rights to indemnification, reimbursement, contribution, or other payment in respect of any Personal Injury Claim or Cargo Damage Claim and any other such rights PLI may have to receive payment (other than payment of Hellenic Litigation Proceeds with respect to which § 6.04 of the Plan shall govern) from any Club or other insurer (or to offset such a right to receive payment against a Claim by any such Club or other insurer). In an effort to preserve insurance coverage for the benefit of holders of Allowed Personal Injury Claims and Cargo Damage Claims, the PLI Disbursement Trust may offset (to the extent permitted by applicable law) any such other right to receive payment from a Club or other insurer against any Claim such Club or insurer may have against PLI.

Subject to the rest of this § 4.05.07(a) of the Plan, the PLI Disbursement Trustee shall attempt to secure the insurance rights of PLI to which it shall succeed. In furtherance thereof, the PLI Disbursement Trustee is authorized to enter into agreements with one or more Clubs or other insurers that provide or provided insurance to PLI or a Predecessor Company, which agreements provide in substance that holders of Allowed Insured Claims have Allowed Claims in Class 5C for the Deductible Claim and that the Club or other insurer shall make cash payments, directly or indirectly, to the holder of the Allowed Insured Claim for any Excess Claim.

The PLI Disbursement Trustee may also take other steps as specified herein reasonably intended to obtain the benefits of insurance and to obtain reimbursement of defense costs in

excess of the applicable deductible. In particular, to the extent necessary in order to obtain payment by a Club or other insurer of Excess Claims, and subject to the availability of funds for such purpose and satisfactory assurances and documentation as set forth below, the PLI Disbursement Trustee is authorized to enter into arrangements under which in substance the PLI Disbursement Trust pays the Allowed Insured Claim in full in cash; the holder of the Allowed Insured Claim repays in cash the full amount of the Deductible Claim and the Club or other insurer reimburses the PLI Disbursement Trust in cash for the full amount of the Excess Claim (and any previously unreimbursed defense costs in excess of the applicable deductible incurred in connection with liquidation of the Claim); and the holder of the Allowed Insured Claim is given an Allowed Claim in Class 5C in the amount of the Deductible Claim. The PLI Disbursement Trustee shall enter into no such arrangement and shall make payment of no such Claim unless it obtains satisfactory assurances and documentation that the PLI Disbursement Trust shall promptly receive in cash repayment and/or reimbursement of the full amount of the Allowed Insured Claim paid by the PLI Disbursement Trust such that the entire amount paid by the PLI Disbursement Trust shall remain available to the PLI Disbursement Trust. The PLI Disbursement Trustee may alternatively enter into any lawful arrangement designed to achieve the same purpose, as may be agreed upon by the holder of an Allowed Insured Claim and the PLI Disbursement Trustee, but in connection with

such an arrangement may not use funds of the PLI Disbursement Trust, as set forth below, unless adequate assurances and documentation are provided ensuring that the PLI Disbursement Trust will promptly receive repayment and/or reimbursement of all amounts paid by the PLI Disbursement Trust.

In order to fund the payment of Allowed Insured Claims pursuant to the types of arrangements set forth above, the PLI Disbursement Trust shall set aside and place in reserve $300,000 of the monies to be transferred from Reorganized PLI to the PLI Disbursement Trust pursuant to § 6.04 of the Plan. Such Liman Funds shall be used solely to fund payments of Allowed Insured Claims as provided above except that, if such funds are not needed for this purpose, the Bankruptcy Court upon proper motion may authorize the use of such funds for other purposes in connection with efforts to liquidate Personal Injury Claims and Cargo Damage Claims and to preserve insurance rights. Upon repayment and/or reimbursement of the full amount of an Allowed Insured Claim paid by the PLI Disbursement Trust using Liman Funds, the funds repaid and/or reimbursed shall be added back to the Liman Funds such that the $300,000 is available as needed on a sustaining basis for use in funding the payment of Allowed Insured Claims.

(ii) To the extent possible, the provisions of this Plan are designed to preserve insurance rights and actions which shall be determined by a Final Order to cause a cancellation or reduction

in coverage shall be deemed void ab initio. Accordingly, any succeeding to an insurance right by the PLI Disbursement Trust which shall result in cancellation or reduction of coverage shall be void ab initio, and Reorganized PLI shall be responsible for pursuing such insurance right to the same extent as the PLI Disbursement Trust would have been under the Plan; provided, however, that in such case Reorganized PLI shall be responsible for pursuing such insurance right only to the extent that the PLI Disbursement Trust provides Reorganized PLI in advance with the necessary financing to pay for all costs, expenses, legal fees and liabilities associated therewith. To the extent possible, the Bankruptcy Court shall have continuing jurisdiction over all aspects of the efforts to preserve insurance rights for the benefit of holders of Allowed Insured Claims.

No Insured Claim shall be deemed discharged hereunder to the extent, but solely to the extent, that the survival of such Claim shall be required in order to preserve an insurance right. Nevertheless, neither the survival of such Claim for the limited purpose of preserving an insurance right nor any other provision of this Plan shall give the holder of such Claim any right whatsoever against Reorganized PLI or any of the other Companies, or any right against the PLI Disbursement Trust (or the VCI Stock Escrow) other than the right (to the extent the Claim is allowed and subject to § 4.05.07(a)(iv) of the Plan) to receive a Class 5C Claim, equal to the Deductible Claim if the Club or insurer is liable for and makes payment in respect of any Excess Claim

relating to such Insured Claim, and any recovery from the Club or other insurer as may be obtained in respect of any such Excess Claim. Notwithstanding any other provision of the Plan, to the extent that there is a determination that a Club or other insurer is not liable for or cannot be required to make payment in respect of a potential Excess Claim, the holder of such a Claim shall have no right whatsoever against Reorganized PLI or any of t. e other companies, and no right against the PLI Disbursement Trust (or the VCI Stock Escrow) except the right to be granted (unless such holder agrees to accept a Class 5C Claim in a lesser amount) a Class 5C Claim equal to the full amount of the Allowed Personal Injury Claim or Allowed Cargo Damage Claim.

(iii) Subject to § 4.05.07(a)(v) of this Plan, the PLI Disbursement Trustee shall attempt to liquidate all unliquidated Personal Injury Claims and Cargo Damage Claims. Since it is likely that all Cargo Damage claims in respect of a voyage (or possibly voyage leg) must be liquidated before it can be determined whether such Claims exceed the applicable deductible for that voyage or voyage leg, the PLI Disbursement Trustee is authorized to liquidate all Cargo Damage Claims against a voyage or voyage leg, as appropriate, before deeming any such Cargo Damage Claim (other than a Cargo Damage Claim in Class 4) relating thereto an Allowed Claim. Subject to §§ 4.05.07(a)(ii) and (iv) of the Plan, once all such Claims for a voyage or voyage leg are liquidated, and to the extent possible without adversely

affecting insurance rights, each Allowed Cargo Damage Claim against the voyage or voyage leg (other than any such Allowed Cargo Damage Claim in Class 4) shall share ratably with all other Allowed Cargo Damage Claims (other than any such Claims in Class 4) against the same voyage or voyage leg based on the allowed amount of each such Cargo Damage Claim (i) a claim against the applicable deductible and shall receive in distribution therefor an Allowed Claim in Class 5C equal to such ratable share, and (ii) a claim in respect of any insurance rights relating to such Allowed Cargo Damage Claims and shall receive in distribution therefor, to the extent recovered, cash from the insurer or Club equal to such ratable share.

(iv) Nothing in this Plan shall require Reorganized PLI or the PLI Disbursement Trust (although the PLI Disbursement Trust may do so subject to § 4.05.07(a)(v)) to pay to any Club or insurer any cash or other consideration in respect of a Claim asserted by such Club or insurer, other than to provide such claimant, to the extent its Claim is allowed, with a Claim in the appropriate class under this Plan. To the extent there shall be a determination that amounts are due and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI, Reorganized PLI, the PLI Disbursement Trust or any claimant in respect of Excess Claims (and to the extent such amounts are not otherwise offset pursuant to § 4.05.07(a)(i) of the Plan or otherwise), and to the extent possible, each holder of an affected

Allowed Insured Claim shall share ratably (with all other holders of affected Allowed Insured Claims based on the allowed amount of each such Insured Claim) (a) a claim against the offset or recouped amount and shall receive in distribution therefor an Allowed Claim in Class 5C and (b) a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefor, to the extent recovered, cash from the insurer or Club equal to such holder's ratable share.

(v) Upon the Modification Date or as soon thereafter as practicable, Reorganized PLI shall transfer to the PLI Disbursement Trust $200,000. The PLI Disbursement Trust shall invest and maintain such Insurance Preservation and Claims Liquidation Funds separate from all other assets of the PLI Disbursement Trust and shall use such funds solely in efforts to liquidate Personal Injury Claims and Cargo Damage Claims and to preserve insurance rights for Allowed Insured Claims as provided in this Section of the Plan. The PLI Disbursement Trustee shall be precluded from using any funds of the PLI Disbursement Trust other than Insurance Preservation and Claims Liquidation Funds in such efforts, except that the PLI Disbursement Trustee may use the Liman Funds for the purposes and subject to the conditions set forth in § 4.05.07(a)(i) of the Plan.

The PLI Disbursement Trustee shall be authorized to consult with lawyers or other professionals, as well as with the Creditors' Committee and the Asbestos Creditors' Committee, con-

cerning the most prudent, efficient, and productive ways to liquidate Personal Injury Claims and Cargo Damage Claims and to attempt to preserve insurance rights and concerning the fairest allocation of expenditures by the PLI Disbursement Trust for these purposes in light of the various different Personal Injury Claims and Cargo Damage Claims and the extent of Insurance Preservation and Claims Liquidation Funds available to the PLI Disbursement Trust. Subject to the availability of Insurance Preservation and Claims Liquidation Funds, such expenditures may include, but are not necessarily limited to, fees of attorneys and other professionals with whom the PLI Disbursement Trustee consults concerning the resolution of Insured Claims and efforts to preserve insurance rights; the legal fees and other costs incurred in liquidating Personal Injury Claims and Cargo Damage claims and in pursuing litigation against a Club or other insurer which the PLI Disbursement Trust may initiate in an effort to preserve insurance rights as set forth in § 4.505.07(a)(vi) of the Plan; expenses incurred in obtaining and reviewing insurance policies of the Debtor or Predecessor Companies; or any cash payments that the PLI Disbursement Trust may determine to make to a Club or other insurer in respect of a Claim it may have against PLI in order to attempt to preserve insurance rights. Subject to § 4.05.07(a)(vi) of the Plan, and any Final Order issued by the Bankruptcy Court, the PLI Disbursement Trustee shall have discretion to determine such uses of Insurance Preservation and Claims Liquidation Funds that are appropriate.

To the extent that the PLI Disbursement Trustee is able to preserve insurance rights in respect of Excess Claims and to liquidate all Personal Injury Claims (including Allowed Late-Filed Asbestos Claims) and Cargo Damage Claims without expending all Insurance Preservation and Claims Liquidation Funds or all Liman Funds, the PLI Disbursement Trustee shall petition the Bankruptcy Court (on notice to the Creditors' Committee, the Asbestos Creditors' Committee, and Creditors who have requested notice under Bankruptcy Rule 2002) for authority to distribute such excess funds (subject to §§ 5.01 and 5.15 of the Plan) on a Pro Rata basis to holders of Allowed Claims in Class 5C.

(vi) To the extent necessary to preserve insurance rights and to obtain payment in respect of Excess Claims by a Club or other insurer, the PLI Disbursement Trust is authorized and directed to file a declaratory judgment action or other appropriate action against such Club or other insurer unless such an action cannot be maintained consistent with settled law. Subject to the entry of any necessary court orders and to the extent not prohibited by applicable law, the Asbestos Creditors' Committee or any holder of a Class 5C Claim shall be authorized to intervene in such an action. The PLI Disbursement Trust shall support the intervention of the Asbestos Creditors' Committee or any holder of a Class 5C Claim desiring to intervene and shall otherwise cooperate to the extent possible with such committee or holder in the prosecution of any such action. Except to the extent the Bankruptcy

Court may authorize the use of the Liman Funds in such an effort, the PLI Disbursement Trust may not use proceeds other than the Insurance Preservation and Claims Liquidation Funds in connection with the prosecution of such an action.

* * *

ARTICLE VI
MEANS OF EXECUTION

The Plan is to be implemented in a manner consistent with the provisions of Section 1123 of the Bankruptcy Code. The Plan contemplates that the following will occur within the time specified:

6.00 *Creation of the PLI Disbursement Trust.* Upon the Modification Date or as soon thereafter as practicable, the PLI Disbursement Trust shall be established. Subject to the rest of this Section of the Plan, the PLI Disbursement Trust shall continue to exist so long as (i) there are sources of potential Available Cash for the PLI Disbursement Trust, (ii) there remain unclaimed distributions, Disputed Claims, or funds held for potential Allowed Late-Filed Asbestos Claims that preclude distributions from the PLI Disbursement Trust to Creditors, or (iii) the PLI Disbursement Trust continues to hold Insurance Preservation and Claims Liquidation Funds, but in no event shall it exist for more than 20 years. At such time as it appears that none of these conditions continues to exist or that there is insufficient cash to pay for the liabilities and costs of

the PLI Disbursement Trust, the Creditors' Committee or the PLI Disbursement Trustee may seek Bankruptcy Court authorization to terminate the PLI Disbursement Trust and to disburse any remaining assets (beyond those needed to cover the liabilities and costs of the PLI Disbursement Trust) to those Creditors entitled to receive such assets in accordance with the Plan or as may otherwise be authorized by the Bankruptcy Court.

The PLI Disbursement Trust shall be distinct from Reorganized PLI, which shall have no liability whatsoever for any obligations of the PLI Disbursement Trust created pursuant to the Plan or otherwise. To the extent that after the Modification Date Reorganized PLI incurs, or is billed for, any expense or liability in respect of a Claim in the PLI Chapter 11 Case (including legal fees incurred in connection with the defense of such Claim but not including any such fees or other expenses incurred in the preparation and litigation by Reorganized PLI of an objection it determines to file to a Claim) or in respect of any event or occurrence arising before the Effective Date, such expense or liability shall be an expense or liability of the PLI Disbursement Trust which shall hold Reorganized PLI harmless therefor and for all other liabilities and obligations of the PLI Disbursement Trust. The PLI Disbursement Trust shall be a distinct taxable entity which shall be liable for any federal, state or local taxes (including income taxes) related to or arising from its assets or activities except to the extent income is distributed or otherwise taxable to the beneficiaries of the trust. No other

entity or individual shall be liable for such taxes. Notwithstanding the above, nothing in this Plan, the PLI Disbursement Trust Agreement, or the Amended PLI Charter shall be deemed to prohibit Reorganized PLI from voluntarily agreeing to pay (or to loan to the PLI Disbursement Trust the funds needed to pay) any obligation of the PLI Disbursement Trust (or from purchasing any Claim against the trust, including any Deferred Priority Claim) where, in the judgment of the board of directors of Reorganized PLI, such action would be in the best interests of Reorganized PLI.

* * *

ARTICLE X
RETENTION OF JURISDICTION

The Bankruptcy Court shall retain jurisdiction over the PLI Chapter 11 Case for the following purposes:

(a) to determine any and all objections to the allowance of Claims and Interests and to estimate the aggregate amount of Allowed Claims in Class 5C (including Allowed Late-Filed Asbestos Claims) to the extent permitted by § 5.14 of the Plan, Section 502(c) of the Bankruptcy Code, and 28 U.S.C. § 157;

(b) to determine any and all applications for allowance of compensation and reimbursement of expenses;

(c) to determine any and all controversies and disputes arising under or in connection with the

Plan, the PLI Disbursement Trust Agreement, or any of the other agreements or instruments issued pursuant to the Plan;

(d) to hear and determine any applications or adversary proceedings or contested matters, including proceedings then pending or thereafter brought to recover or avoid preferences or fraudulent conveyances or actions brought against persons who were officers or directors of PLI or VCI at any time before the Effective Date;

(e) to determine and fix all Claims arising from the rejection of any executory contract or lease;

(f) to enforce the provisions of the Plan;

(g) to hear any application to modify the Plan in accordance with Bankruptcy Code Section 1127, or to correct any defect, cure any omission, or reconcile any inconsistency in the Plan, Original Disclosure Statement, Amended Disclosure Statement, Confirmation Order, Modification Order, the PLI Disbursement Trust Agreement or any of the other agreements or instruments issued pursuant to the Plan as may be necessary to carry out the purposes of the Plan;

(h) to resolve disputes concerning Insured Claims and disputes with Clubs or other insurers to the extent permitted by law; and

(i) to determine such other matters as may be provided for in the Confirmation Order or the Modification Order.

Respectfully submitted,

OFFICIAL COMMITTEE OF UNSECURED CREDITORS

By: /s/ Albert Franco. its Chairman

COLD SPRING SHIPPING, L.P.

By: /s/ Cold Spring Shipping. Inc., its General Partner

VESSEL CHARTERS, INC.

By: /s/ Mark M. Feldman. its President

* * *

Dated: August 17, 1990

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In a Proceeding for a Reorganization
under Chapter 11

Case No. 86-B-11773 (HCB)

In re
PRUDENTIAL LINES, INC.,
Debtor.

EXTRACTS FROM

SUPPLEMENTAL DISCLOSURE STATEMENT ACCOMPANYING SECOND AMENDED JOINT PLAN OF REORGANIZATION, AS MODIFIED, PROPOSED BY THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, COLD SPRING SHIPPING, L.P., AND VESSEL CHARTERS, INC.

The Official Committee of Unsecured Creditors (the "Creditors' Committee"), Cold Spring Shipping, LP. ("Cold Spring"), and Vessel Charters, Inc. ("VCI") provide this Supplemental Disclosure Statement in connection with certain modifica-

tions proposed by the Creditors' Committee, Cold Spring, and VCI (collectively, the "Proponents") to the Second Amended Joint Plan of Reorganization, dated as of October 2, 1989 (the "Original Plan").

The Bankruptcy Court has approved this Supplemental Disclosure Statement as containing information sufficient to enable affected Creditors to make an informed judgment about the proposed modifications. However, the Bankruptcy Court has made no determination as to the merits of the proposed modifications. The Bankruptcy Court has scheduled a hearing to consider confirmation of the Original Plan as modified (the "Modified Plan") on September 26, 1990, at 2:00 P.M. in Room 601 of the Old United States Customs House, 1 Bowling Green, New York, New York.

A copy of the Modified Plan is enclosed herewith. The Supplemental Disclosure Statement contains summaries of certain provisions of the Modified Plan that were not included in the Original Plan or that have been modified and of related documents (some of which are in draft form and may be adjusted prior to the Modification Date). However, the summaries are qualified to the extent that they do not set forth the complete text of the Modified Plan and related documents. YOU ARE THEREFORE URGED, BEFORE VOTING ON THE MODIFIED PLAN, TO READ THE MODIFIED PLAN AND THE ATTACHED DOCUMENTS IN THEIR ENTIRETY. Pursuant to Bankruptcy Court order, the Proponents have attached to the Disclosure Statement and the Modified Plan as sent

to Creditors drafts of certain important related documents, such as the Amended PLI Charter and the Amended VCI Charter, and have agreed to make available drafts of other documents, such as the various notes, mortgages, and security agreements to be issued in connection with the Modified Plan. A list of the documents that are available upon request is attached hereto as Exhibit 1. Creditors who wish to review the drafts of these documents may do so by writing to Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington, D.C. 20037, Attention, Patrick T. Connors.

Unless otherwise noted, capitalized terms used in this Supplemental Disclosure Statement have the meaning set forth in the Modified Plan.

* * *

BACKGROUND

The Creditors' Committee and Cold Spring were the proponents of the Original Plan. By Order dated October 3, 1989, the Bankruptcy Court approved a disclosure statement as containing adequate information concerning the Original Plan (the "Original Disclosure Statement"). Thereafter, copies of the Original Disclosure Statement, the Original Plan, and a ballot were mailed to Creditors. Following acceptance of the Original Plan by those classes of Creditors that were impaired, the Bankruptcy Court confirmed the Original Plan by Order dated December 15, 1989 (the "Confirmation

Order").[1] The Original Plan became effective on December 21, 1989. As contemplated, new management assumed control of PLI and a company affiliated with Philip J. Shapiro, Polaris Shining, Inc. ("Polaris"), assumed operating responsibility in connection with PLI's subsidiary, VCI, which owns three vessels (the Santa Adela, the Santa Juana, and the Santa Victoria) on charter to the United States Military Sealift Command ("MSC").

In preparing the Original Plan, the Creditors' Committee and Cold Spring relied extensively on information provided by former management of the Debtor, including financial data concerning the Debtor and VCI. Projections through 1995 prepared by the Debtor indicated that, if the three VCI vessels remained on charter and subject to certain other assumptions, VCI would likely generate sufficient cash flow to cover its operating costs, to pay $400,000 per year to the NYSA-ILA Pension Trust Fund (the "Fund") in settlement of the Fund's "withdrawal liability" claim against VCI (for a discussion of that claim, see pages M-76–M-77 of the Original Disclosure Statement), and to provide a source of cash flow for priority and unsecured Creditors of the Debtor. The Creditors' Committee and

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[1] The Original Plan as confirmed contained certain modifications and additions made to the version sent to Creditors with the Original Disclosure Statement; these changes related principally to Class 5C and were largely requested by counsel for many of the asbestos claimants. A copy of the Original Plan as amended and confirmed is attached to the Confirmation Order and is available for inspection through the Clerk's office at the Bankruptcy Court and by request of the Proponents.

Cold Spring structured the Original Plan on the basis of these projections.

The principal reasons for the proposed modifications to the Original Plan relate to (1) the actual financial condition of VCI as of the Effective Date as compared with the financial condition the Creditors' Committee and Cold Spring anticipated based on information provided by former management of PLI and VCI, and (2) the operating projections for VCI provided by former management which appear to have beat unrealistic. The adverse developments at VCI include the following:

* * *

These developments have led to significant cash shortfalls at VCI. In January 1990, PLI made two interest-bearing loans to VCI totaling $350,000 (the "PLI Initial Loans"). Despite these loans, VCI was unable in March 1990 to make two substantial scheduled payments: another $200,000 payment to the Fund and a payment of approximately $175,000 in respect of both Title XI debt (the "Santa Victoria Title XI Debt") and a loan from Marad (the "Marad Loan") secured by mortgages on the Santa Victoria.

* * *

OUTLINE OF PRINCIPAL ELEMENTS OF THE PROPOSED RESTRUCTURING

The following is a brief outline, subject to potential exceptions, of certain of the principal elements of the proposed restructuring contemplated by the Modified Plan. It is not meant to be

an exhaustive description of the restructuring and is not a substitute for a careful review of the entire Supplemental Disclosure Statement, the Modified Plan, and all accompanying documents.

- The withdrawal liability claim of the Fund will be subject to a settlement under which (among other things) VCI will make one additional cash payment of $250,000 and will issue convertible voting preferred stock to the Fund that will have certain preferred dividend and redemption rights and entitle the Fund to a liquidation preference in the event of the dissolution of VCI. VCI will not have to make further cash payments to the Fund pursuant to the Withdrawal Liability Stipulation.

- A newly-formed, wholly-owned subsidiary of PLI, "Shipco", will purchase two of the VCI vessels, the Santa Adela and the Santa Juana, for (among other consideration and in connection with all the other transactions contemplated under the Modified Plan) $2.5.million and forgiveness of the PLI Initial Loans. VCI will use the $2.5 million to make the $250,000 payment to the Fund; to repay principal and interest on the $552,000 Cold Spring First Loan, the $350,000 PLI Second Loan, and the $300,000 Cold Spring Second Loan; to prepay the existing first mortgages on the Santa Adela and the Santa Juana; to help fund the payment of charter hire for the Charter Vessels (*see below*); and possibly further to reduce payables and to provide

working capital. Shipco will obtain the $2.5 million from a loan to be made by a newly-formed partnership, HBT, L.P. ("HBT"). This loan will be secured by mortgages on the two vessels that will be acquired by Shipco, by a PLI guarantee, by a second priority lien on all PLI assets, and by a security interest in the special account created by Shipco for the charter payment made by VCI pursuant to the Shipco-VCI Charter Parties.

- Shipco will "bareboat charter" each of the Santa Adela and the Santa Juana back to VCI for a period coextensive with the MSC Contract for the vessel Including any option period to extend the MSC Contract if exercised by MSC and to the extent the vessel remains on charter to MSC throughout the option period), charging for both vessels combined a total of $500,000 in charter hire for the primary term of the MSC Contracts for the two Charter Vessels and providing for quiet enjoyment for MSC with respect to use of each vessel during the term of the MSC Contract for that vessel. The bareboat charter agreements will allow VCI, if (and only if) it satisfies certain conditions (*see* pages 10-11 below), to renew the bareboat charters at market rates at the conclusion of the MSC Contracts.

- To facilitate distributions to Creditors, a PLI Disbursement Trust will be created.

VCI will issue a note in the amount of $5 million, payable from Available Cash of VCI, to the PLI Disbursement Trust. The note will be secured by a mortgage on the vessel that will still be owned by VCI, the Santa Victoria, junior to the existing mortgages on that vessel.

- HBT will make a $500,000 loan to Reorganized PLI, repayment of which will be guaranteed by Shipco and will be secured by a third priority lien on all PLI assets, and by a second mortgage on the two vessels acquired by Shipco. Subject to certain limits and conditions, HBT will also commit to advance funds, secured by a first lien on all PLI assets, a Shipco guarantee, and a second mortgage on the two vessels acquired by Shipco, for various expenses that have been incurred since the Effective Date and that likely will be incurred after the Modification Date, including expenses in connection with preparation of the plan modifications, corporate and administrative expenses of Reorganized PLI and Shipco, and legal fees and other expenses in regard to pending litigation.

* * *

- All of the common stock in VCI currently owned by Reorganized PLI will be cancelled as of the Modification Date. 50,000 shares of VCI Common Stock will be issued to a VCI Stock Escrow Agent for the benefit of holders of Allowed Claims in

Class 5C. Following expiration or termination of the latter of the MSC Contracts for the Santa Adela and the Santa Juana, the VCI Stock Escrow Agent will attempt to sell the 50,000 shares and (after the Inter-Class Proportionate Distribution Date), to distribute any VCI Stock Net Sale Proceeds to holders of Allowed Claims in Class 5C.

* * *

4. *The Plan Financing Loan*: Under the Original Plan, Cold Spring was to make a $500,000 loan to PLI to help fund that plan. Under the Modified Plan, HBT will make the $500,000 loan, the proceeds of which will be available for Reorganized PLI to use to make payments of Class 1 and Class 2 Claims (other than Deferred Administrative Claims and Deferred Priority Claims or other priority claims paid on a deferred basis) and Class 3 and Class 4 Claims and to reduce payables incurred since the Effective Date (including legal fees advanced by Cold Spring). To the extent not used for these purposes, the loan proceeds will be part of the funds available for Reorganized PLI to transfer to the PLI Disbursement Trust.

The $500,000 loan will be evidenced by a promissory note (the "Plan Financing Note") in the principal amount of $500,000 to be given by Reorganized PLI to HBT. The Plan Financing Note will be due and payable on the earlier of December 31, 1994 or the date when the Shipco Note becomes due and payable, except that the note shall be subject to acceleration under cer-

tain conditions (including, but not limited to, a default in an amount in excess of $10,000 by Reorganized PLI or Shipco on any of their other debt or other payment obligations). The Plan Financing Note will bear interest at the rate of 15% per annum. It will be senior in priority of payment to all other obligations of Reorganized PLI other than Reorganized PLI's obligations in respect of the New Commitments. After repayment of all funds (plus interest thereon) provided by HBT pursuant to these commitments, Reorganized PLI will be required on March 31 of each year starting in 1991 (and will have the right at all times) to use all Available Cash of Reorganized PLI to pay accrued interest and thereafter to redeem as much of the Plan Financing Note as is possible. The Plan Financing Note will be fully guaranteed by Shipco and will be secured by a second mortgage on the Charter Vessels and by a third priority lien on all existing and subsequently acquired assets of Reorganized PLI, including its stock in Newco and Shipco, other than the Transferred Assets.

5. *The New Commitments*: In addition to making the Charter Vessels Mortgage Loan and the Plan Financing Loan, HBT will also commit, subject to certain limits and conditions, to provide funding by way of loans for various expenses in connection with the preparation and implementation of the Modified Plan, general corporate and administrative matters, and ongoing litigation. HBT will thus commit to provide funds up to an aggregate of (1) $400,000 (to the extent that Reorganized PLI otherwise has inadequate

reserves or capital) to finance the legal fees and other expenses incurred by Reorganized PLI or VCI, or on their behalf by Cold Spring, in connection with the negotiation, preparation and distribution of the Fund Settlement, the Modified Plan and Amended Disclosure Statement and related documents (the "Modified Plan Funding Expenses Commitment"), (2) $250,000, to the extent that Reorganized PLI or Shipco otherwise has inadequate reserves or capital, for general administrative and corporate expenses incurred by or on behalf of Reorganized PLI and Shipco on or after the Effective Data ("Reorganized PLI/Shipco General Corporate and Administrative Expenses Commitment"); and (3) $200,000 for legal fees and other charges incurred by or on behalf of Reorganized PLI (to the extent that Reorganized PLI otherwise has inadequate reserves or capital) or Cold Spring on or after the Effective Date in connection with two litigation matters and other potential related legal efforts ("Litigation Funding Commitment"). HBT will have discretion to advance funds in excess of the dollar limits specified above in respect of these commitments.

* * *

6. *The PLI Disbursement Trust*: The Modified Plan provides for Reorganized PLI to transfer certain assets to the PLI Disbursement Trust which will assume all obligations for distributions to Creditors following the Modification Date (except for certain distributions in respect of stock in PLI and VCI to be made from the Reorganized PLI Shares Trust and VCI Stock

Escrow). THE PLI DISBURSEMENT TRUST WILL BE DISTINCT FROM REORGANIZED PLI, WHICH WILL HAVE NO LIABILITY FOR ANY OBLIGATIONS OF THE PLI DISBURSEMENT TRUST. The rights and obligations of the PLI Disbursement Trust and the PLI Disbursement Trustee are set forth in the Modified Plan and in a trust agreement that will be substantially in the form of the draft contained at Exhibit E to the Modified Plan. CREDITORS ARE URGED TO READ THE PERTINENT SECTIONS OF THE MODIFIED PLAN AND THE DRAFT OF THE PLI DISBURSEMENT TRUST AGREEMENT CAREFULLY.

Under the Original Plan, Reorganized PLI was to administer the distribution of cash payments in respect of Claims in Classes 1 - 4 and to issue "Reorganized PLI Notes" to Unsecured Creditors (other than those in Class 4). After the Effective Date Reorganized PLI began to make cash payments in respect of certain priority and Class 4 Claims, but stopped when VCI's financial problems became clear. For the same reason and because the Claims resolution process had not been completed with respect to the affected classes, Reorganized PLI distributed no Reorganized PLI Notes. NO SUCH NOTES WILL BE ISSUED PURSUANT TO THE MODIFIED PLAN.

Under the Modified Plan, it is expected that payment on certain Class 1 and Class 2 Claims will be deferred in whole or part with the agreement of the Creditors. Other than in respect of these Claims, Reorganized PLI will attempt to complete by the Modification Date, to the extent

possible, the payment of Allowed Claims in Class 1, Class 2, Class 3 and Class 4. To the extent, however, that this process is not completed by the Modification Date — because a Claim is disputed or has not yet been allowed by Final Order, because an attempted payment is returned as unclaimed, or for any other reason — the PLI Disbursement Trust will assume all responsibility to make payment of these Claims after the Modification Date, and Reorganized PLI will have no further liability therefor.

The PLI Disbursement Trust will also assume all liability with respect to Deferred Administrative Claims and Deferred Priority Claims.

The PLI Disbursement Trust will be funded as follows: As noted above, the VCI Note will be payable to the PLI Disbursement Trust. In addition, after making payments to Creditors in Classes 1-4 to the extent set forth above and after probably making certain other payments,[8] Reorganized PLI will transfer on the Modification Date to the PLI Disbursement Trust all excess cash it then has on hand including any unused proceeds derived from (1) the $500,000 Plan Financing-Loan from HBT, (2) VCI's repayment of the PLI Second Loan, and (3) two orders to show cause that the Bankruptcy Court issued

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[8] As previously discussed, it is expected that on the Modification Date Reorganized PLI will use some of the cash available to it (including possibly some of the proceeds from the $500,000 Plan Financing Loan, the repayment of the PLI Second Loan, and the Aruba Litigation Proceeds and the Hellenic Litigation Proceeds), to make payment of amounts owed to Cold Spring for legal fees chargeable to PLI that Cold Spring has advanced.

at Reorganized PLI's request since the Effective Date (the "Aruba Litigation Proceeds" and the "Hellenic Litigation Proceeds"). Reorganized PLI will also transfer to the PLI Disbursement Trust all rights it has to receive any payments in respect of the Egyptian Litigation.[9] In addition, upon the Modification Date, the PLI Disbursement Trustee will be deemed the representative of the estate for purposes of pursuing (in the PLI Disbursement Trustee's discretion, see pages 38-39 below), and will be vested with all powers to pursue, any preference, fraudulent conveyance or other actions the estate may have for recovery of transfers pursuant to Sections 547, 548, and 549 of the Bankruptcy Code, other than any such actions against "insiders" (as that term is defined in the Bankruptcy Code) of the Debtor or an affiliate thereof including former management of PLI and VCI; any recovery the PLI Disbursement

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[9] The Modified Plan provides that the PLI Disbursement Trustee may authorize counsel to prosecute the Egyptian Litigation only on a contingency fee basis, unless the Bankruptcy Court enters a Final Order to the contrary. The counsel prosecuting the Egyptian Litigation is currently handling the *Amon* matter on a contingency fee basis and has agreed as part of the overall arrangement with such counsel and subject to Bankruptcy Court approval to also handle the *Nile Soap* matter on such a basis (with respect to the period after June 1988). *See* pages 26-27 below. As discussed below, Reorganized PLI has filed an application for authority to pay such counsel certain fees it asserts it is owed for the period through June 1988, including fees in respect of the *Nile Soap* matter.

Trustee might obtain in such an action will be an asset of the PLI Disbursement Trust.[10]

Using these sources of funds, and after paying expenses and liabilities of the PLI Disbursement Trust (and, if necessary, expenses of the Reorganized PLI Preferred Shares Trust and VCI Stock Escrow as discussed below) and reserving certain amounts as discussed below, the PLI Disbursement Trustee will make distributions of Available Cash of the PLI Disbursement Trust to PLI Creditors. The trustee will make such distributions, first, to holders of Deferred Administrative Claims until such Claims have been paid in full, thereafter to holders of Deferred Priority Claims until such Claims have been paid in full, and finally, to the extent of any remaining Available Cash and subject to possible adjustment as discussed below, to Cold Spring and to holders of Allowed Claims in Classes 5A, 5C, and, if it votes for the Plan, Class 6 ("Assenting Class 6").

Distributions of Available Cash will be made (unless the Bankruptcy Court orders otherwise) as soon as practicable after the PLI Disbursement Trust receives a payment in respect of the VCI Note or a recovery in respect of the Egyptian Litigation or a claim under Sections 547, 548, or 549 of the Bankruptcy Code that the PLI Disbursement Trustee may determine to bring which results in Available Cash, with Available Cash calculated as of the date the PLI Disbursement

[10] Reorganized PLI will retain no right, title or claim to the assets (or any income derived therefrom) of the PLI Disbursement Trust and will have no reversionary interest in any of these assets.

Trust receives the distribution producing the Available Cash to be distributed, except that distributions of Available Cash to Cold Spring and to holders of Allowed Claims in Classes 5A, 5C and Assenting Class 6 will not commence until all Disputed Claims in Classes 5A, 5B and Assenting Class 6 are resolved and the aggregate amount of Allowed Claims in Class 5C has been estimated by the Bankruptcy Court. *See* pages 37-38 below. The proportionate interest of Cold Spring and holders of Allowed Claims in Classes 5A, 5C and Assenting Class 6 in distributions of Available Cash of the PLI Disbursement Trust (after payment in full of all Deferred Administrative Claims and all Deferred Priority Claims), and possible adjustments to those interests, are discussed at pages 32-33 below.

In addition to its responsibilities to make distributions of Available Cash, the PLI Disbursement Trustee will be responsible for various matters relating to efforts to preserve insurance rights for the benefit of Insured Claims and the resolution of Disputed Claims. See pages 34-37 below. Subject to the provisions discussed below and the terms of the PLI Disbursement Trust Agreement, the PLI Disbursement Trust will continue to exist so long as there are sources of potential Available Cash of the PLI Disbursement Trust, there sue unclaimed distributions, Disputed Claims, or funds held for possible additional Allowed Late-Filed Asbestos Claims that preclude distributions to Creditors, or there remain funds for use to liquidate Personal Injury and Cargo Damage Claims and to preserve insurance rights ("Insurance Preservation and Claims

Resolution Funds"). When none of these conditions continues to exist or when it appears that the PLI Disbursement Trust has insufficient cash to pay for the liabilities and costs of the PLI Disbursement Trust, Bankruptcy Court authorization may be sought to terminate the PLI Disbursement Trust and to disburse any remaining assets thereof (beyond those needed to cover the liabilities and costs of the PLI Disbursement Trust) to those Creditors entitled to receive such assets under the Modified Plan or as may otherwise be authorized by the Bankruptcy Court. In no event shall the PLI Disbursement Trust continue to exist for more than 20 years.

The PLI Disbursement Trust will hold Reorganized PLI harmless in respect of all liabilities the PLI Disbursement Trust assumes under the Modified Plan. Similarly, to the extent that Reorganized PLI may have any liabilities in connection with any of the assets or powers transferred or granted to the PLI Disbursement Trust (or with respect to, or that would be covered by, the insurance rights to which the trust will succeed), Reorganized PLI will be discharged with respect thereto and such liabilities will become liabilities of the PLI Disbursement Trust which will hold Reorganized PLI harmless in respect thereof. The PLI Disbursement Trust will also hold PLI harmless and assume all liability for any expense or liability Reorganized PLI incurs or is billed for after the Modification Date in respect of a Claim in the PLI Chapter 11 Case or in respect of any event or occurrence arising before the Effective Date (other than costs in connection with the

preparation and litigation of any objections Reorganized PLI may determine to file to a Claim).

The PLI Disbursement Trustee will maintain separately and not include in Available Cash of the PLI Disbursement Trust for distribution to Creditors funds for payment of Class 1 or Class 2 Claims (other than Deferred Administrative Claims and Deferred Priority Claims) and Class 3 or Class 4 Claims that have not been paid by Reorganized PLI by the Modification Date, including (1) any Disputed Claim that if Allowed will be in Class 1, 2, 3 or 4 (*see* pages 38-40 below) or (2) any Claim in those Classes, payment of which Reorganized PLI could not complete by the Modification Date because of the return of an attempted payment or because a payment proved undeliverable to the holder. In fact, several payments to Class 4 Creditors that Reorganized PLI attempted to make after the Effective Date were returned apparently because the address shown on the proof of claim filed by the Creditor apparently is no longer correct.[11]

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[11] The Modified Plan generally provides that any unclaimed or undeliverable distribution by Reorganized PLI or the PLI Disbursement Trust (including distributions of Available Cash to Cold Spring and to Creditors in Classes 5A, 5B, and Assenting Class 6) will be held by the PLI Disbursement Trust for the benefit of the Creditor for whom the distribution was intended (unless otherwise ordered by the Bankruptcy Court) until the fifth anniversary date of entry of the Modification Order or the first anniversary of the attempted distribution, whichever is later. Such a distribution will be made to the Creditor upon presentation by the Creditor of proper proof of its entitlement thereto. Similarly, any unclaimed or undeliverable shares of stock or proceeds thereof plus any net income earned thereon (after sub-

The PLI Disbursement Trustee will also maintain separately and not include in the calculation of Available Cash $200,000 of the funds to be transferred by Reorganized PLI as of the Modification Date. As discussed more fully below, the $200,000 will be available to the PLI Disbursement Trustee for use in efforts to liquidate Personal Injury and Cargo Damage Claims and to preserve insurance rights. *See also* page 35 below concerning possible use of additional funds of the

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tracting for funds needed to cover fees, costs and expenses of the Reorganized PLI Shares Trust or VCI Stock Escrow as provided in the Plan and the Reorganized PLI Shares Trust Agreement and the VCI Stock Escrow Agreement) held by the Reorganized PLI Preferred Shares Trustee or the VCI Stock Escrow Agent shall be maintained for the benefit of the Creditor for whom they were intended (unless the Bankruptcy Court orders otherwise) until the later of one year after the attempted distribution or five years after entry of the Modification Order, pending presentation by the Creditor of proper proof of its entitlement thereto. Attempted payments on or prior to the Modification Date by Reorganized PLI of Class 1, 2, 3 or 4 Claims that remain unclaimed or undeliverable after the fifth anniversary of the date of entry of the Modification Order (or such other date as the Bankruptcy Court orders) shall be included in the next calculation of Available Cash of the PLI Disbursement Trust for distribution to Creditors pursuant to the Modified Plan. The Modified Plan generally provides that other attempted distributions that remain unclaimed or undeliverable after the relevant cutoff date will be distributed by the PLI Disbursement Trustee (or the Reorganized PLI Shares Trustee or the VCI Stock Escrow Agent, as appropriate) on a Pro Rata basis (excluding the Claims for which distributions remain unclaimed or undeliverable) in accordance with the terms of the Modified Plan to the remaining identifiable holders of Allowed Claims in the appropriate class.

trust to fund payments of Allowed Insured Claims.

The PLI Disbursement Trustee will be required to furnish quarterly reports (or at such other frequency as the Bankruptcy Court may require) to the Bankruptcy Court, the Creditors' Committee, and the Asbestos Creditors' Committee (if in existence). These reports will describe steps taken to implement the Modified Plan. Creditors wishing to obtain copies of such report may do so through the Bankruptcy Court.

The general expenses and liabilities of the PLI Disbursement Trust, including the compensation of the PLI Disbursement Trustee, will be paid from the PLI Disbursement Trust and will be deducted in calculating Available Cash thereof. The PLI Disbursement Trustee may also maintain a reasonable working capital reserve and reserve in respect of its liabilities, which reserve will also be subtracted in calculating Available Cash of the PLI Disbursement Trust. The PLI Disbursement Trustee will be required to obtain Bankruptcy Court authorization before he can use funds of the PLI Disbursement Trust that would otherwise be available for distribution to Creditors to retain counsel, accountants or others to assist him in matters relating to administration of the PLI Disbursement Trust (except that the PLI Disbursement Trustee will be able, without obtaining Bankruptcy Court approval, to use Insurance Preservation and Claims Resolution Proceeds in efforts to preserve insurance coverage and to liquidate Personal Injury Claims and Cargo Damage Claims).

The PLI Disbursement Trustee as of the Modification Date will be Lee J. DiCola. Mr. DiCola, who has served in similar positions in reorganization proceedings involving UNIMET Corporation and its subsidiary, ESMET Inc, and The Gibbons-Grable Company, will receive annual compensation of $107,000 plus reimbursement for such expenses as may be approved by the Bankruptcy Court. The annual compensation will cover the cost of any office space used by Mr. DiCola and Mr. DiCola's services as VCI Stock Escrow Agent (see below), and will be subject to reduction in the event that Mr. DiCola is not also simultaneously serving as an officer and director of VCI. After the expiation or termination of the latter of the two MSC Contracts for the Charter Vessels to expire or terminate, the Creditors' Committee will be authorized to review the annual compensation in light of the remaining work to be performed by the PLI Disbursement Trustee and to petition the Bankruptcy Court for a reduction in the PLI Disbursement Trustee's compensation.

Mr. DiCola will also be the initial VCI Stock Escrow Agent. As part of his obligations as VCI Stock Escrow Agent, it is contemplated that Mr. DiCola will become an officer and director of VCI on or as soon as practicable after the Modification Date.

The interest of Creditors in the PLI Disbursement Trust will be subject to limitations on transferability. As more fully set forth in the PLI Disbursement Trust Agreement, no transfers will be allowed except by will, intestate succession or operation of law.

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CLASSIFICATION OF CLAIMS AND DISTRIBUTIONS TO CREDITORS

The only significant change in classification of Creditors under the Modified Plan is that Class I consists solely of holders of Allowed Administrative Claims and Class 2 consists of holders of all other Allowed Claims entitled to priority under Sections 507(a)(2) — (7) of the Bankruptcy Code. Distributions will be substantially as provided in the Original Plan except as previously discussed and as discussed below. The Modified Plan will continue to provide for no distribution to the holder of the Allowed Interest.

* * *

Classes 5A, 5B, 5C, and 6: The classification of Creditors under the Modified Plan in Classes 5A, 5B, 5C and 6 will be essentially the same as under the Original Plan. Based on additional information the Proponents have obtained since the Effective Date, and because of uncertainties concerning the amount at which various Claims including Personal Injury Claims and Cargo Damage Claims will be liquidated (and the extent to which limited resources are likely to be used to pursue objections to Claims), the Proponents can provide no assurance of the overall amount of Allowed Claims in these Classes in combination or of any particular Creditor's proportionate interest in these Classes. It is possible that the total amount of Allowed Claims in Classes 5A, 5B, 5C and 6 will substantially

exceed prior estimates. The PLI Disbursement Trustee, the Reorganized PLI Shares Trustee, and the VCI Stock Escrow Agent shall be responsible for making distributions and taking actions with respect to these classes after the Modification Date, and neither Reorganized PLI nor any of the other Companies shall have any liability to any Creditor with respect to any Claim in any such class after the Modification Date.

The following chart briefly summarizes the distributions, subject to certain exceptions, under the Modified Plan to be made to or for the benefit of holders of Allowed Claims in Classes 5A, 5B, 5C and 6.

Class	Distribution
5A	(1) interest in 55,000 Reorganized PLI Preferred Shares (Class A) to be issued on or as soon as practicable after the Modification Date to the Reorganized PLI Shares Trustee (subject to reduction if Class 6 votes for the Modified Plan and Class 6 Creditors are "old and cold"); and (2) percentage of any distributions of Available Cash of the PLI Disbursement Trust after payment in full of all Deferred Administrative Claims and Deferred Priority Claims. The percentage of any distributions as described in (2) above to be accorded to Class 5A shall reflect the ratio of all Allowed Claims in Class 5A to all Allowed Claims in Classes 5A, 5B, 5C and 6, except that the Bankruptcy

	Court may require a reduction in or complete elimination of such percentage (and an increase in the percentage of such distributions for Class 5C) if necessary in order to provide substantially equal treatment to Class 5C.
Cold Spring (5B)	(1) 44,000 Reorganized PLI Preferred Shares (Class B); and (2) percentage of any distributions of Available Cash of the PLI Disbursement Trust after payment in full of all Deferred Administrative Claims and Deferred Priority Claims. The percentage of any distributions as described in (2) above to be accorded to Cold Spring shall (subject to reduction if Class 6 votes for the Modified Plan) reflect the ratio of all Allowed Claims in Class 5B and Class 6 (with respect to which Cold Spring is entitled to distributions) to all Allowed Claims in Classes 5A, 5B, 5C and 6, except that the Bankruptcy Court may require a reduction in or complete elimination of such percentage (and an increase in the percentage of such distributions for Class 5C) if necessary in order to provide substantially equal treatment to Class 5C.
5C	(1) interest in the net proceeds (if any) derived from 50,000 shares of VCI Common Stock to be issued to

the VCI Stock Escrow Agent; (2) percentage of any distributions of Available Cash of the PLI Disbursement Trust after payment in full of all Deferred Administrative Claims and Deferred Priority Claims; (3) possible benefits as a result of insurance rights PLI may have in respect of Class 5C Claims, with $200,000 to be set aside for use by the PLI Disbursement Trustee in efforts to liquidate Personal Injury Claims and Cargo Damage Claims and to preserve insurance rights. The percentage of any distributions as described in (2) above to be accorded to Class 5C shall reflect the ratio of all Allowed Claims in Class 5C (as estimated by the Bankruptcy Court until all Disputed Claims in Class 5C, and all potential Allowed Late-Filed Asbestos Claims, have been resolved) to all Allowed Claims in Classes 5A, 5B, 5C and 6, except that the Bankruptcy Court may require an increase in the percentage of such distributions for Class 5C if necessary in order to provide substantially equal treatment to Class 5C.

* * *

— *Equity in VCI.* As previously noted, on or as soon as practicable after the Modification Date, 50,000 shares of VCI Common Stock will be issued for the benefit of holders of Allowed

Claims in Class 5C to the VCI Stock Escrow Agent, who will attempt to sell the stock after the latter of the MSC Contracts for the two Charter Vessels expires or is terminated. If the VCI Stock Escrow Agent is able to sell some or all of the stock, each holder of an Allowed Claim in Class 5C will receive its Pro Rata interest in the VCI Stock Net Sale Proceeds (after deduction of funds needed to cover liabilities or expenses of the VCI Stock Escrow, as previously discussed, and subject to the general proscription in the Modified Plan, discussed below (*see* page 40), on distributions from the PLI Disbursement Trust or the VCI Stock Escrow to any Creditor in Classes 5A, 5C or Assenting Class 6 of less than $5). If the VCI Stock Escrow Agent is unable to sell the stock within six months of the date when the latter of the two MSC Contracts for the Charter Vessels expires or is terminated, he may petition the Bankruptcy Court for authority to abandon the stock and to distribute any dividends paid on such stock and any income earned thereon on a Pro Rata basis to holders of Allowed Claims in Class 5C (subject, again, to deduction from the distribution to cover liabilities and expenses of the VCI Stock Escrow and to the general proscription in the Modified Plan on distributions of less than $5 to a Creditor in Class 5C). Creditors classified in Classes 5A, 5B and 6 will not receive any interest in VCI Common Stock.

— *Interest in Available Cash of the PLI Disbursement Trust.* The Modified Plan provides for the possibility of distributions of Available Cash of the PLI Disbursement Trust, to the extent

there is any following payment in full of all Deferred Administrative Claims and Deferred Priority Claims, to Creditors in Classes 5A, 5B, 5C and Assenting Class 6. No such distribution shall occur until the Inter-Class Proportionate Distribution Date.

* * *

Insured Claims: As under the Original Plan, it is contemplated under the Modified Plan that, to the extent possible, holders of Allowed Insured Claims will obtain a Claim in Class 5C in the amount of the Deductible Claim and will obtain, to the extent recovered, cash from the Club or other insurer in respect of any Excess Claim. The principal changes in the Modified Plan with respect to Insured Claims are that the PLI Disbursement Trust, rather than Reorganized PLI, will have responsibility for efforts to liquidate Personal Injury Claims and Cargo Damage Claims and to preserve insurance rights; that $200,000 of the funds transferred on the Modification Date by Reorganized PLI to the PLI Disbursement Trust will be set aside for these efforts (the "Insurance Preservation and Claims Resolution Funds"); and that (subject to certain conditions discussed below) the PLI Disbursement Trust will be authorized to make available (with credit support from HBT subject to the terms discussed below) up to $300,000 to fund payments of Allowed Insured Claims on terms designed to ensure that the PLI Disbursement Trust is reimbursed any such amounts it pays.

Subject to the PLI Disbursement Trust Agreement, the PLI Disbursement Trust will succeed

to all of PLI's insurance rights in existence as of the Effective Date (but not to any insurance rights of VCI) including all such rights to indemnification, reimbursement, contribution, or other payment in respect of any Personal Injury Claim or Cargo Damage Claim and any other such rights that PLI may have to payment (other than payment of Hellenic Litigation Proceeds) from any Club or insurer. However, any such succession that causes a cancellation or reduction in insurance coverage will be deemed void ab initio, and Reorganized PLI will be responsible to pursue such insurance right to the extent that the PLI Disbursement Trust would have been and to the extent that the PLI Disbursement Trust provides Reorganized PLI in advance with the necessary funds to pay for all costs, expenses, legal fees and liabilities associated therewith.

The PLI Disbursement Trustee will be authorized to consult with counsel and other professionals, the Creditors' Committee, and the Asbestos Creditors' Committee concerning the most prudent and efficient ways to liquidate Personal Injury Claims and Cargo Damage Claims, and to try to preserve insurance rights and concerning the fairest allocation of the Insurance Preservation and Claims Resolution Funds available for these purposes. Among other things for which the PLI Disbursement Trustee can use such money are fees of attorneys and others with whom the trustee consults on such matters, legal fees and costs incurred in attempting to liquidate Personal Injury Claims and Cargo Damage Claims, funding of payments of Allowed Insured Claims in the types of arrangements discussed

below, legal fees incurred in litigation against a Club (see discussion below), expenses incurred in obtaining and reviewing insurance policies, and any cash payments that the PLI Disbursement Trust might determine to make to a Club for monies owed to it by the Debtor in order to try to preserve insurance rights.

As with Reorganized PLI under the Original Plan, the PLI Disbursement Trustee will be authorized to enter into agreements with Clubs under which holders of Allowed Insured Claims will have Claims in Class 5C equal to the Deductible Claim and the Clubs will make payment, directly or indirectly, to the holder of the Insured Claim for any Excess Claim. Similarly, to the extent Clubs refuse to enter into such agreements and insist that the PLI Disbursement Trust must "pay first" before they have any indemnification obligation, the PLI Disbursement Trustee will be authorized, upon obtaining satisfactory assurances as discussed below, to enter into arrangements under which in substance the PLI Disbursement Trust pays the Allowed Insured Claim into an escrow account; the money is released from the escrow account to the holder of the Claim after (or upon the making of suitable arrangements for immediate) (a) reimbursement by the Club or other insurer of the entire amount of the Excess Claim and any defense costs in excess of the applicable deductible and (b) repayment by the holder of the Claim of the entire amount of the Deductible Claim; and the holder of the Claim is given a Class 5C Claim in the amount of the Deductible Claim. The Modified Plan requires the PLI Dis-

bursement Trustee, before entering into such arrangements, to obtain satisfactory assurances and documentation that the funds in the escrow account will not be released except upon reimbursement and repayment as provided above; that such funds while in the escrow account will not be subject to attachment, setoff, garnishment, levy or other claim, loss or proceeding; and that the funds held in the escrow account will be repaid to the PLI Disbursement Trust within 30 days of payment of the Claim by the PLI Disbursement Trust into the escrow account.[29]

In order to fund such payments of Allowed Insured Claims, the Modified Plan authorizes the PLI Disbursement Trust if it obtains satisfactory assurances and documentation as previously discussed to make available when and as needed up to $300,000 and provides, if the PLI Disbursement Trust otherwise does not have $300,000 or such lesser amount as may be needed to fund such a payment, for HBT to provide credit support to the PLI Disbursement Trust pursuant to

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[29] The PLI Disbursement Trust will also be authorized to enter into other lawful arrangements designed to achieve the same purpose, such as arrangements whereby the claimant advances the funds to the PLI Disbursement Trust to pay the Allowed Insured Claim and, if the PLI Disbursement Trust obtains reimbursement from the Club of the Excess Claim, the claimant is repaid the loan to the extent of the reimbursement and the claimant obtains a Claim in Class 5C in the amount of the Deductible Claim. However, the PLI Disbursement Trustee will be able to use funds of the PLI Disbursement Trust or request credit support from HBT (*see* discussion below) in connection with such arrangements only if such assurances and documentation as are set forth in the Modified Plan are obtained.

an agreement to be executed by HBT and the PLI Disbursement Trust. HBT's obligations to provide such credit support will extend until the fifth anniversary of the Modification Date and will, in each instance, be contingent on its obtaining assurances and documentation which it deems adequate that are substantially similar to those discussed in the previous paragraph, that ensure that HBT will suffer no loss, and that provide for use of a financial institution acceptable to HBT.

The provisions in the Original Plan concerning liquidation of Cargo Damage Claims (Section 4.05.07(a)(iii)) and discharge of Insured Claims (Section 4.05.07(a)(ii)) are largely the same, although some changes have been made, including (but not limited to) changes to reflect the role of the PLI Disbursement Trust under the Modified Plan. As under the Original Plan, it is contemplated that (to the extent possible) the Bankruptcy Court shall have continuing jurisdiction over the efforts to preserve insurance rights.

No assurances can be given that the PLI Disbursement Trustee will be able to preserve insurance rights and to obtain cash payments in respect of Excess Claims from Clubs or other insurers. The provisions in the Modified Plan concerning Insured Claims have not been agreed upon by any Clubs. The Club that appears to have been the Debtor's principal protection and indemnity insurer, the American Steamship Owners Mutual Protection and Indemnity Association, Inc. ("American Club"), has in the past taken the position that its indemnity policies

require PLI to "pay first" before the Club is obligated to make reimbursement (and it appears that other Clubs which provided insurance coverage to PLI or a Predecessor Company may take the same position). It also appears that the American Club takes the position that the payment by PLI of an Insured Claim using funds loaned by the claimant (*see* note 29 above) does not satisfy the "pay first" obligation under the policy.[30]

Moreover, the American Club and another Club that provided protection and indemnity insurance for PLI, the Liverpool and London Steamship Protection and Indemnity Association Ltd. ("Liverpool and London Club"), have stated that they intend to deny coverage with respect to certain Personal Injury Claims and/or Cargo Damage Claims because (among other things) the Debtor allegedly failed to provide the Clubs with timely notice of the Claims. The American Club has also notified PLI that it intends to avail itself of all applicable defenses under the insurance policies and both Clubs have cautioned that PLI must provide an adequate defense in each case. The Liverpool and London Club has also informed Reorganized PLI that it may consider certain provisions in the Original Plan (which are largely replicated in the Modified Plan), including provisions designed to attempt to

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[30] One holder of a Personal Injury Claim who entered into such a loan arrangement with PLI has filed an action for a declaratory judgment and monetary relief against the American Club. *Oberton v. American Steamship Owners Mutual Protection & Indemnity Assn.*, No. 89 Civ. 0377 (S.D.N.Y.).

secure for holders of Insured Claims PLI's insurance rights, a violation of the Club's rules. While the Clubs' positions on these issues may be subject to dispute and challenge, no assurances can be given regarding such matters.

Moreover, it appears that the Debtor may owe monies to the American Club in respect of unpaid assessments and premiums and possibly other matters relating to certain policy years. In August 1989, the American Club filed a second amended proof of claim in the PLI Chapter 11 Case for approximately $2.5 million. The extent of the American Club's Claim may be disputed and it may, in turn, owe PLI certain amounts in refunds of premiums and for reimbursement of certain losses incurred by PLI before the Effective Date (including possibly amounts relating to the collision between a PLI vessel and the MV "Hellenic Carrier" in 1981); indeed, its proof of claim states that its Claim may be subject to a setoff of approximately $490,000 representing estimated potential refunds to PLI for insurance years 1976 through 1985. Under the Modified Plan, in order to try to preserve insurance coverage, the PLI Disbursement Trust will be authorized (to the extent permitted under applicable law) to setoff such amounts owed to PLI against the American Club's Claim. Nevertheless, it is possible that, after adjustment of the various amounts owing, the American Club may have a substantial net Claim against PLI, and the American Club has taken the position that until any net amount owed to it by PLI is satisfied it will not make cash payments in respect of any Claims.

In this regard, the Modified Plan authorizes (but does not require) the PLI Disbursement Trustee, in an effort to preserve insurance coverage, to use some of the Insurance Preservation and Claims Resolution Funds to make cash payments to Clubs in respect of any Claims they have (although it is possible that the American Club's net Claim against PLI could exceed $200,000). In addition, it is contemplated under the Modified Plan, as under the Original Plan, that to the extent possible consistent with applicable law monies owed to a Club may be offset by reducing the amounts that the Club would otherwise have to pay in respect of Excess Claims. Thus, the Modified Plan provides that to the extent amounts are owing from PLI to a Club which the Club can offset or recoup against amounts due to PLI (and to the extent the amounts are not otherwise offset), and to the extent possible, each holder of an affected Allowed Insured Claim will share ratably a Class 5C Claim equal to the offset or recouped amount (as well as a Class 5C Claim equal to the Deductible Claim). As a result, the cash payments that otherwise might be obtained from the American Club in respect of certain Excess Claims may be reduced. The American Club has to date not agreed to such a procedure.

Additional issues may exist with respect to insurance coverage for Asbestos Claims. Some of those Claims appear to arise from voyages dating back as far as the 1940s and 1950s. In some cases, the claimants did not sail on PLI vessels, but rather on vessels of Grace Lines, Inc., which apparently was acquired by PLI in the 1960s.

Moreover, the new management of Reorganized PLI has discovered that PLI does not have copies of many of the relevant insurance policies.[31] It is possible that some of the voyages giving rise to certain of the Claims may have been insured by underwriters who are no longer in business (or are insolvent) or that the relevant records (with respect to certain Asbestos Claims and perhaps with respect to certain other Personal Injury Claims and Cargo Damage Claims as well) are no longer available. The American Club has informed the Proponents that it intends to take the position with respect to Asbestos Claims that there is a separate deductible for each year that a claimant sailed on a PLI or Grace Lines vessel insured through that Club. At the request of counsel for many of the Asbestos Claims, Reorganized PLI has submitted information concerning certain such claimants to the American Club. The American Club has declined to negotiate concerning these submitted Asbestos Claims.

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[31] Based on the information available to them, the Proponents understand that the American Club insured Grace Lines vessels in the 1950s and 1960s (and perhaps the 1940s as well), that PLI apparently was a member of the American Club from February 1968 through January 1971, and that PLI again became a member of the American Club in February 1975 (and that during 1985 and 1986 some PLI vessels were insured through the Liverpool & London Club). In addition, the Proponents understand that for a period prior to February 1975 PLI vessels were apparently insured through the United Kingdom Steamship Assurance Association (Bermuda) Ltd. (the "United Kingdom Club"), which has claimed that it did not obtain timely notice of certain Personal Injury Claims potentially insured through that Club.

Because of these difficulties involving Insured Claims, the Modified Plan provides for $200,000 (the "Insurance Preservation and Claims Resolution Funds") to be set aside for use by the PLI Disbursement Trustee in efforts to liquidate Personal Injury Claims and Cargo Damage Claims and to preserve insurance rights, including if necessary litigation against the Clubs. Under the circumstances, given the limited funds that are available to PLI, and the need to provide for payment of Administrative Claims, Priority Tax Claims, and Other Priority Claims, the Proponents believe that the amount set aside for these purposes is appropriate. EXCEPT WITH RESPECT TO FUNDING OF PAYMENTS OF ALLOWED INSURED CLAIMS UNDER THE TYPES OF ARRANGEMENTS DISCUSSED PREVIOUSLY (*SEE* PAGES 34-35), THE PLI DISBURSEMENT TRUSTEE WILL NOT BE ABLE TO USE PROCEEDS OF THE PLI DISBURSEMENT TRUST OTHER THAN THE INSURANCE PRESERVATION AND CLAIMS LIQUIDATION FUNDS FOR THESE PURPOSES.

With respect to litigation, the Modified Plan provides that, if necessary to preserve insurance rights and to obtain payment from a Club or other insurer in respect of an Excess Claim and subject to the availability of Insurance Preservation and Claims Liquidation Funds, the PLI Disbursement Trust shall commence a declaratory judgment action or other action against such a Club or other insurer unless such an action cannot be maintained consistent with applicable law. The Modified Plan provides for the PLI Dis-

bursement Trust to support the intervention of the Asbestos Creditors' Committee or any holder of a Class 5C Claim who desires to intervene and otherwise to cooperate to the extent possible with the Asbestos Creditors' Committee or such holder in the prosecution of such an action. The Proponents cannot warrant that such intervention will be granted or that the Insurance Preservation and Claims Resolution Funds available for this purpose will be sufficient to allow for a successful prosecution of such an action.

The Modified Plan, like the Original Plan, provides that to the extent there is a determination that a Club or other insurer is not liable for or cannot be required to make payment in respect of Excess Claims, the holder of the Claim shall be entitled (unless the claimant agrees otherwise) to a Class 5C Claim in the full amount of the Allowed Personal Injury Claim or Allowed Cargo Damage Claim. The holder of such a Claim will have no other right against the PLI Disbursement Trust, Reorganized PLI, the VCI Stock Escrow, or any of the other Companies.

The Bankruptcy Court has extended the automatic stay under Section 362 of the Bankruptcy Code with respect to Personal Injury Claims and has established procedures to attempt to resolve unliquidated Personal Injury Claims other than Asbestos Claims.

* * *

CONCLUSION

For the reasons stated, the Proponents believe that modification of the Original Plan is necessary and that, under the circumstances, the Modified Plan is in the best interests of Creditors.

OFFICIAL COMMITTEE OF
UNSECURED CREDITORS

By: /s/ Albert Franco, its Chairman

COLD SPRING SHIPPING, L.P.

By: /s/ Cold Spring Shipping, Inc.,
its General Partner

VESSEL CHARTERS, INC.

By: /s/ Mark M. Feldman, its
President

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 86-11773, Adv. Proc. # 90-6830A
December 10, 1992, Decided

In Re: PRUDENTIAL LINES, INC.,
Debtor,

LEE DICOLA, TRUSTEE OF
THE PLI DISBURSEMENT TRUST,
Plaintiff,

—v.—

AMERICAN STEAMSHIP OWNERS MUTUAL
PROTECTION AND INDEMNITY ASSOCIATION, INC.,
Defendant.

L. C. Jaques, Esq., and A. Kellman, Esq., The Maritime Asbestosis Legal Clinic, Detroit, Michigan, for Plaintiff-Intervenors Asbestosis Claimants ("Asbestosis Claimants" or "Claimants").

R. H. Brown, Esq., and J. Pratt, Esq., Kirlin, Campbell & Keating, Esqs., New York, New York, for Defendant American Steamship Owners

Protection and Indemnity Association, Inc. ("American Club" or "Club").

Conrad, Judge*

MEMORANDUM OF DECISION ON SUMMARY JUDGMENT AND 11 U.S.C. § 553

Trustee commenced this declaratory action[1] under 28 U.S.C. §§ 2201, 2202 and Federal Rules of Bankruptcy Procedure 7001(9) to determine coverage under various marine protection and indemnity insurance policies ("P & I policies"). The defendant, American Club, issued numerous P & I policies to the debtor, Prudential Lines, Inc. ("PLI"), during a business relationship that spanned more than forty years. Both parties have stipulated to the relevant facts and now move for summary judgment on all issues presented.

At least two issues presented here are of first impression in New York: whether injury-in-fact triggers coverage under a P & I policy in asbestos

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* Sitting by special designation.

[1] Our subject matter jurisdiction over this controversy arises under 28 U.S.C. § 1334(b) and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.). On April 2, 1991, we signed an order that the matter *sub judice* is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), and (O). This Memorandum of Decision constitutes findings of fact and conclusions of law under F.R.Civ.P. 52, as made applicable by F.R.Bkrtcy.P. 7052.

litigation and whether coverage under term P & I policies should be allocated pro rata among the various yearly insurance policies. We also address several other issues raised in the parties' motions for summary judgment: applicability of policy deductibles, Trustee's obligations under triggered P & I policies and the Plan's "Liman" provision to pay the Asbestosis Claimants before being indemnified by American Club, whether American Club is entitled to offset unpaid premiums against payments to the insured under different policies, and whether Trustee must pay interest accruing post-petition on pre-petition past-due premiums and assessments.

In the Memorandum of Decision that follows, we award summary judgment in favor of Asbestosis Claimants concerning the number and applicability of policy deductibles, the enforceability of the Plan's "Liman" provision, and interest accrued on past-due policy premiums and assessments. We award partial summary judgment to American Club on the setoff issue. Regarding the trigger issue, we reaffirm New York law that injury-in-fact during the policy period triggers coverage. Finally, we deny summary judgment on the issue of whether policy coverage should be allocated in proportion to the length of asbestos exposure.

PROCEDURAL HISTORY

Creditors filed an involuntary petition against PLI under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq*. On November 4, 1986, PLI filed its consent to Entry of Order for Relief.

The Second Amended Joint Plan of Reorganization ("the Plan") was confirmed on October 4, 1990. The Plan created the PLI Disbursement Trust ("the Trust") under the PLI Disbursement Trust Agreement ("the Agreement"). According to the Agreement, the Trust was established to liquidate asbestos-related personal injury claims and to enforce the Trust's interests under PLI's numerous insurance policies. The Plaintiff in this action, Lee J. Dicola, as Trustee of the PLI Trust, currently holds all rights and interests of PLI in the Trust assets. These assets include various P & I policies drafted and issued by the Defendant, American Club, to PLI and its predecessors, Grace Lines, Inc., Prudential-Grace Lines, Inc., and Prudential Steamship Company (collectively, "PLI").

On December 14, 1990, Trustee commenced an adversary proceeding against American Club, PLI's insurer. Trustee seeks a declaratory judgment concerning various aspects of P & I policies issued by American Club to PLI. On April 2, 1991, we signed an order declaring the adversary proceeding to be a core proceeding and denying American Club's motion to abstain. This order was upheld on appeal to the United States District Court for the Southern District of New York.

By order dated February 26, 1991, Asbestosis Claimants were given permission to intervene in Trustee's adversary proceeding as the real parties in interest. On November 20, 1991, Asbestosis Claimants filed a motion for summary judgment. American Club filed its motion for summary judgment on November 21, 1991. In reference to their cross motions for summary

judgment, the parties filed an Agreed Statement of Facts on November 21, 1991. Both parties have submitted memoranda of law and reply memoranda regarding the issues presented in the adversary proceeding.

On November 28, 1991, American Club moved under Federal Rules of Bankruptcy Procedure 4001 and 9014 for relief from stay to permit setoff of its unpaid premiums and assessments. We consider this motion in our discussion of the setoff issue, *infra*.

FACTUAL BACKGROUND

PLI was a United States shipping company incorporated under Delaware law with its principal place of business in New York. PLI operated various shipping vessels and employed thousands of merchant marines during its years of operation. Following their employment on PLI vessels, a significant number of merchant marines developed asbestos-related diseases. These asbestotic injuries form the basis of the Asbestosis Claimants' personal injury action against PLI's insurer, American Club[2]

American Club, a New York Corporation with its principle place of business in New York, is a nonprofit mutual insurance association of shipowners. American Club underwrote PLI's insurance policies from 1940 through 1970 and from 1975 through the early months of 1986. From

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[2] An order granting Asbestosis Claimants' motion to intervene was signed on February 21, 1991. The order also consolidated Trustee's objection to claim number 7760 with this adversary proceeding.

1971 through 1974, PLI belonged to another insurance club.

As insurer for PLI and other shipping companies, American Club issued yearly insurance policies to participating shipowners. According to the standard insurance agreement between American Club and participating shipping companies, each vessel was deemed to be a separate interest with separate insurance. Each vessel was insured by name according to tonnage and risk estimates.

American Club sold "assess" policies, meaning that the Club charged each participant its premium according to the amount necessary to cover claims and related expenses owed in the insurance year. After about ten years when it was assumed that the vast majority of claims were known and evaluated, the Club established a reserve to cover remaining unpaid claims. Once this reserve was created, the insurance year was officially closed and no further assessments were made. Unpaid reserve funds were distributed pro rata to American Club participants according to the premiums each participant paid in the relevant insurance year.

PLI failed to pay its insurance premiums to American Club during the 1979, 1983, 1984, and 1985 insurance years. In all other years in which PLI was a participant in American Club, PLI paid all premiums and assessments. For the purposes of the present declaratory judgment action, PLI and American Club have stipulated to the following amounts. First, the parties agree that the unpaid premiums, as reduced by refunds, equal a net principle balance of $1,270,980.82. Second, the accrued interest on this amount from

the filing date of PLI's petition through June 15, 1991 is $350,814.94. The parties further stipulate that American Club owes Trustee $145,655.57, excluding interest, relating to other claims. Finally, Trustee contends that American Club owes an additional $216,304.62 relating to certain other claims.

The P & I policies at issue here contain standard terms and conditions which were identical in most respects from year to year.[3] The deduc-

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[3] The relevant provisions of a sample policy from 1979 are as follows:

> AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC. . . . DOES INSURE (Herein called collectively the Assured) . . . IN THE INSURED SUM OF DOLLARS at or from the 20th day of February 1979, at noon, Greenwich Mean time until the 20th day of February 1980 at noon, Greenwich Mean time against the risks and subject to the terms and conditions hereunder set forth in respect of the vessel
>
> . . .
>
> * * *
>
> THE ASSOCIATION AGREES TO INDEMNIFY THE ASSURED AGAINST ANY LOSS, DAMAGE OR EXPENSE WHICH THE ASSURED SHALL BECOME LIABLE TO PAY AND SHALL PAY BY REASON OF THE FACT THAT THE ASSURED IS THE OWNER . . . OF THE INSURED VESSEL AND WHICH SHALL RESULT FROM THE FOLLOWING LIABILITIES, RISKS, EVENTS, OCCURRENCES AND EXPENDITURES:
>
> (1) LIABILITY FOR LIFE SALVAGE, LOSS OF LIFE OF, OR PERSONAL INJURY TO OR ILLNESS OF ANY PERSON . . . LIABILITY HEREUNDER WITH RESPECT TO A MEMBER OF THE CREW

tible amount under each of the P & I policies, varied, however, according to the year the policy was issued. In the 1940s and 1950s, deductibles ranged from $500 to $1,000 per occurrence. During the 1960s and 1970s, deductibles ranged from a low of $2,500 to a high of $100,000 per occurrence. Until 1989, it was American Club's practice to apply one deductible for each policy year.

Policy limits also varied in the applicable insurance years. Typically, policy limits were $2,000,000 in the 1940s and $5,000,000 in the 1950s. This amount increased throughout the 1960s and 1970s to $10,000,000. In the early 1980s, the stated policy limit was $100,000,000.

Asbestosis Claimants, composed of more than 5000 individuals, have filed more than 7000 claims in PLI's bankruptcy. The Asbestosis Claimants seek damages for their injuries on the grounds of negligence under the Jones Act, 46 U.S.C. § 688, *et seq.*, and on the grounds of unseaworthiness under the General Maritime Law. Each claimant has alleged employment on one or more PLI shipping vessels at some time between 1940 and early 1986, when PLI left the American Club. Claimants contend that their exposure to asbestos on PLI ships has resulted in various forms of asbestotic disease. Most

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SHALL INCLUDE LIABILITY ARISING ASHORE OR AFLOAT.

This liability is then subject to five conditions, including the following:

(e) Claims hereunder, other than for burial expenses, are subject to a deduction of $ with respect to each accident or occurrence.

claimants also worked aboard non-PLI vessels during the time period above.

The negative health effects of asbestos exposure have been well documented for decades. The parties have stipulated in the Agreed Statement of Facts that inhaling asbestos causes physical injury. Once inhaled, asbestos causes a variety of respiratory diseases whose manifestations occur with the passage of time. These diseases include mesothelioma, pleural abnormalities, and interstitial fibrosis.

DISCUSSION

This declaratory judgment action seeks to resolve the legal uncertainties surrounding insurance coverage when a toxin previously assumed safe for use later proves harmful or fatal to humans. As in cases involving exposure to lead, Agent Orange, and PCBs, exposure to asbestos frequently predates manifestation of the resulting disease by more than a generation. With this in mind, we begin our analysis of the parties' respective positions in the light of the applicable law.

We have jurisdiction under Federal Rules of Bankruptcy Procedure 7001(9) to determine the rights and duties of the parties by declaratory judgment if there is an "actual controversy." *See*, 28 U.S.C. § 2201. The test of justiciability under this statute is ". . . whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific*

Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L. Ed. 826 (1941). The present adversary proceeding satisfies these requirements.

The dispute between American Club and Asbestos Claimants hinges on the construction of maritime P & I policies. P & I policies originated in England in the nineteenth century after a court decision held that hull underwriters here not liable for payment of the liabilities of the insured owner or his vessel arising out of negligence. *De Vaux v. Salvador,* 111 Eng. Rep. 845 (1836). After the *De Vaux* decision, insurers, including Lloyds of London, offered a new form of marine insurance that provided indemnification for prescribed losses during a fixed term. The new type of policy insured against risks over a given time period; such policies became known as "time" policies. P & I policies are a subset of time policies. Routinely, P & I policies protect shipping companies against liabilities arising from ownership of a particular ship during a given year. *See,* Parks, *The Law and Practice of Marine Insurance and Average,* vol. 1 (Cornell Maritime Press 1987).

The historical distinction between "protection" and "indemnity" risks is relevant in considering the scope of the modern P & I policy. Protection risks include loss of life, personal injury, collision liabilities, and damage to piers. Indemnity risks involve damage to and loss of cargo as well as fines and penalties. More than a century ago, the two classes of risks were insured in separate mutual associations. Today, they are insured together in the typical P & I policy. Parks, *The Law and Practice of Marine Insurance and Aver-*

age, supra, 843. Historical support therefore exists for the position that P & I policies offer more comprehensive coverage than pure indemnification policies.

A P & I policy is a maritime contract. The Admiralty Clause of the United States Constitution renders the construction of a maritime contract a matter of federal law. *Wilburn Boat Co. v. Fireman's Ins. Co.*, 348 U.S. 310, 313, 75 S. Ct. 368, 370, 99 L. Ed. 337 (1955). A federal court sitting in admiralty must apply federal choice of law rules. *State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld,* 921 F.2d 409, 414, 1991 AMC 1147 (2d Cir. 1990). The United States Supreme Court has held that in the absence of a controlling federal law, the scope and validity of marine insurance policies are determined under state law. *See, Wilburn Boat Co., supra.*

The parties agree that to the extent that federal admiralty rules do not exist, the interpretation of the relevant insurance policies is governed by New York law. The facts surrounding the dispute support this conclusion. American Club drafted and issued the P & I policies in New York. The parties also negotiated the insurance policies in New York. New York is therefore the jurisdiction with the most significant nexus with the insurance contract. *See, State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld, supra,* 921 F.2d at 414 (2d. Cir. 1990).

Both American Club and Asbestosis Claimants have moved for summary judgment on the issues of insurance contract interpretation raised by Trustee in the declaratory judgment action. On cross motions for summary judgment, the court

must determine whether one of the parties is entitled to judgment as a matter of law on the basis of the undisputed facts. *In re Drexel Burnham Lambert Group, Inc.*, 139 Bankr. 697, 694 (Bankr.S.D.N.Y. 1992) (citation omitted).

The standards for summary judgment are well known. To prevail in a motion for summary judgment, the movant must satisfy the criteria set forth in Fed.R.Civ.P. 56,[4] as made applicable to this Court under F.R.Bkrtcy.P 7056. The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when no genuine issue of material fact is in dispute.

The function of this court when considering a motion for summary judgment is not to resolve disputed issues of fact but to determine whether there is a genuine issue to be resolved. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Moreover, in determining whether a genuine issue has been raised, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962) (per curiam). Therefore, not only must there be no genuine issue as to the evidentiary facts, but

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[4] Rule 56 provides in part: "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Eastman Machine Company, Inc. v. United States*, 841 F.2d 469 (2d Cir. 1988).

there must also be no controversy regarding the inferences to be drawn from them. *Donahue v. Windsor Locks Board of Fire Commissioners,* 834 F.2d 54, 57 (2d Cir. 1987); *accord, Anderson v. Liberty Lobby, Inc., supra.*

The burden is on the party moving for summary judgment to establish the absence of any genuine issue of material fact. *Federal Deposit Ins. Corp. v. Bernstein,* 944 F.2d 101, 106 (2nd Cir. 1991), citing, *Anderson v. Liberty Lobby, Inc., supra.* Any ambiguities must be resolved in favor of the non-movant. *Celotex Corp. v. Catrett,* 477 U.S. 317, 330 n. 2, 106 S. Ct. 2548, 2556 n. 2, 91 L. Ed. 2d 265 (1986). Speculation and conjecture are insufficient. Only after the moving party has met its initial burden must the opposing party set forth specific facts showing that there is a genuine issue for trial and that the disputed facts are material.

The starting point in interpreting an insurance policy is to determine whether the policy terms are ambiguous. Whether or not an insurance contract is ambiguous is a matter of law. *Walk-In Medical Centers, Inc. v. Breuer Capital Corp.,* 818 F.2d 260, 263, 3 U.C.C.R. Serv. 2d (Callaghan) 1885 (2d Cir. 1987). As a general rule, plain or unambiguous language will be given its ordinary meaning and effect, and the need to resort to rules of construction arises only when an ambiguity exists. *Ingersoll Mill. Mach. Co. v. M/V Bodena,* 829 F.2d 293, 306, 1988 AMC 223 (2nd Cir. 1987), *cert. denied,* 484 U.S. 1042, 108 S. Ct. 774, 98 L. Ed. 2d 860 (1988) (citations omitted).

If the policy is ambiguous, New York law applies the following rules of construction. An

ambiguous insurance contract will generally be construed against the insurer who drafted it in order to promote coverage to which the policy relates. This principle applies to all types of insurance contracts, including maritime policies. *Ingersoll Mill. Mach. Co. v. M/V Bodena, supra,* 829 F.2d at 306 (citations omitted).

An insurance contract must be construed to effect the intent of the parties as expressed by their words and purposes. *American Home Products Corp. v. Liberty Mutual Ins. Co.,* 565 F. Supp. 1485, 1492 (S.D.N.Y.1983), *aff'd as modified,* 748 F.2d 760 (2d Cir.1984) *("AHP").* The construction of ambiguous provisions must not be inconsistent with the plain meaning of the language or the parties' obvious intentions. *AHP,* 565 F. Supp. at 1492. When the meaning or applicability of particular words and phrases are at issue, the policy must be viewed from the vantage point of the "reasonable expectations and purposes of the ordinary businessman." *Avondale Indus., Inc. v. Travelers Indem. Co.,* 697 F. Supp. 1314, 1319 (S.D.N.Y.1988), *aff'd,* 887 F.2d 1200 (2d Cir.1989), *cert. denied,* 496 U.S. 906, 110 S. Ct. 2588, 110 L. Ed. 2d 269 (1990).

Moreover, if a contract or its terms appear ambiguous, the burden is on the insurer to establish that the construction it seeks is the only reasonable interpretation of the policy language. *Vargas v. Insurance Co. of North America,* 651 F.2d 838, 840 (2d Cir.1981). In resolving an ambiguity, the court must look to extrinsic evidence for aid in ascertaining the parties' intent if the insurer's construction of the policy is reasonable. *Uniroyal Inc. v. Home Ins. Co.,* 707 F.

Supp. 1368, 1374-5 (E.D.N.Y.1988) *("Uniroyal")*. If such extrinsic evidence raises an issue of credibility, then it is an issue of fact for the factfinder. *Uniroyal,* 707 F. Supp. at 1374 . If there is no material extrinsic evidence, *Carvel Corp. v. Rait,* 117 A.D.2d 485, 503 N.Y.S.2d 406, 409 (N.Y.A.D. 2d Dept.1986) or if such evidence fails to raise credibility or present a choice among reasonable inferences, it is a case for construction by the court as a matter of law. *Alfin, Inc. v. Pacific Ins. Co.,* 735 F. Supp. 115, 119 (S.D.N.Y.1990). In this event, "the court must follow the rule of *contra proferentum* to construe any ambiguities against the insurer drafter." *Uniroyal,* 707 F. Supp. at 1376; *See, Stonewall Ins. Co. v. National Gypsum Co.,* 1992 WL 123144 (S.D.N.Y.1992) (not reported in F.Supp.).

In the parties' cross motions for summary judgment concerning insurance coverage, two aspects of "ambiguity" appear to be in conflict: ambiguity in an insurance contract that may render summary judgment improper as a matter of federal procedure and ambiguity in an insurance contract that must be construed by the court as a matter of substantive state contract law. Federal procedure under Rule 56 states that ambiguities are to be resolved following a full presentation of extrinsic evidence to the factfinder, whereas New York's substantive law requires that ambiguities be reasonably construed against the insurer. Other courts addressing this legal dilemma have ruled that summary judgment is proper on an ambiguous insurance policy when, after having allowed full discovery and found no valuable extrinsic evidence of the parties' intent, the court

applies the state law presumption construing the policy against the insured. *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1373-78 (E.D.N.Y. 1988). However, issues involving unambiguous insurance provisions are ripe for disposition in a motion for summary judgment. We follow the above rules in the matter now before us.

I. Coverage Trigger

The first issue before us concerns the triggering of coverage under the relevant P & I policies. As a threshold matter, we hold that the insurance policies relevant here are not ambiguous concerning the trigger issue. The issue is therefore proper for summary judgment.

The P & I policies at issue here provide that the duty to indemnify is based on "liability for . . . personal injury. . . ." The parties agree that asbestosis constitutes actual injury and is a disease compensable under the P & I policies. The parties disagree, however, concerning when liability arose and whether the progressive nature of the disease triggers liability under subsequent policies covering periods after initial exposure.

Not surprisingly, the insurer advocates a less expansive interpretation of policy coverage. American Club argues that its obligation to indemnify arises when asbestos causes real injury during the policy period. According to the parties' stipulation of facts, this real injury occurs at exposure. American Club also states that when a merchant marine is exposed to asbestos on more than one ship, the second policy is also triggered. American Club's position is referred to as the "exposure theory." *See, Insur-*

ance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), modified on rehearing, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109, 102 S. Ct. 686, 70 L. Ed. 2d 650 (1981); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109, 102 S. Ct. 686, 70 L. Ed. 2d 650 (1981).

Asbestosis Claimants agree that the exposure theory may be applicable here. Asbestosis Claimants, however, also argue in favor of "exposure in residence," a more comprehensive theory of coverage in which all subsequent PLI policies are triggered following the initial exposure to asbestos, even policies covering vessels on which the injured never worked and policies issued for periods when the injured did not work for PLI. Citing *Keene Corp. v. Ins. Co. of North America*, 215 U.S. App. D.C. 156, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007, 102 S. Ct. 1644, 71 L. Ed. 2d 875; 102 S. Ct. 1645 (1982) *("Keene")*, Asbestosis Claimants argue that all policies in force during the continuous bodily injury process, from first exposure to asbestos through manifestation of the asbestos-related disease, must indemnify PLI in full to the applicable policy limit for all asbestos-related personal injuries and lawsuits against PLI. Asbestosis Claimants base their argument on the continuous progression of asbestos-related disease after initial exposure and what they term the "result-oriented" language of the P & I policies.

Trigger is often the fundamental issue in asbestosis litigation because the insurer at the

triggering event becomes obligated to provide coverage under the terms of the insurance contract. Although widespread asbestosis litigation has created numerous decisions in the last few years concerning comprehensive general liability ("CGL") policies,[5] there is unfortunately little if any case law regarding what triggers P & I coverage. CGL policies provide coverage that is admittedly broader than their P & I policy cousins. We believe, however, that the similarities outweigh the differences in matters concerning the trigger issue. We therefore seek guidance from recent decisions in which fellow courts have interpreted CGL policies under New York law in light of personal injury claims for asbestosis.

The plain language of the P & I policies at issue here forms the starting point of our analysis. The policies list fifteen liabilities that are covered by the insurer, including the following relevant provisions:

> The Association agrees to indemnify the assured against any loss, damage or expense which the assured shall become liable to pay and shall pay by reason of the fact that the assured is the owner . . . of the insured vessel and which shall result from the following *liabilities, risks, events, occurrences* and expenditures:

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[5] The comprehensive general liability policy is a standard form insurance policy that was introduced by the insurance industry in the mid-1960s. The policy was designed to provide liability coverage for injuries caused over a period of time.

> (1) *Liability* for life salvage, *loss or life of,* or *personal injury* to or illness of any person . . . arising ashore or afloat [emphasis ours]."

Liability is a broad legal term that generally is defined as all debts and obligations arising under law, whether contingent or absolute, express or implied. This is not an ambiguous term. *See, Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 1257 (5th Cir. 1976). Similarly, personal injury is a term with only one reasonable interpretation: a damage done to a man or woman's person, as distinguished from an injury to property or reputation.

Each P & I policy also states the period of the coverage. For example, the 1979 policy provides

> American Steamship Owners Mutual Protection and Indemnity Association, Inc. . . . does insure [the Assured] . . . in the insured sum of Dollars at or from the 20th day of February 1979, at noon, . . . until the 20th day of February 1980 at noon . . .

The time period of the above policy is clearly unambiguous. Reading the words "liability" and "personal injury" coupled with the yearly policy term, we conclude that liability for personal injury arising during the policy term triggers coverage. We believe that this interpretation best reflects the parties' intent as expressed by their words and purposes.

Asbestosis Claimants' interpretation of the P & I policies errs in several respects. Claimants state that according to the language of the policy,

American Club agreed to indemnify PLI "against any loss, damage or expense . . ." On the basis of this language, Claimants argue that American Club undertook the obligation to indemnify PLI for all asbestos-related injuries following the initial exposure, regardless of whether injured seamen continued to serve on PLI vessels. Asbestosis Claimants also argue that New York law requires that the policy be construed to maximize coverage. We believe, however, that Asbestosis Claimants' position misconstrues the general rules of insurance law and contractual interpretation applicable here.

At the most basic level, the P & I policies that PLI purchased were yearly contracts for indemnification for losses and damages arising from the ownership and operation of a ship during the policy period. If we were to accept the Claimant's interpretation of continuous trigger, the yearly term of the policy would become meaningless. The essence of the agreement was indemnification for losses and liabilities arising during the stated term of the contract. In contrast, Asbestosis Claimants' construction of the P & I policies would provide perpetual coverage without payment of premiums, an actuarial nightmare in an insurance situation in which the premiums and deductibles were recomputed annually. We believe that the terms of policies should be construed to give the insurance contract a reasonable meaning that most clearly reflects the probable intentions of the parties.

On the basis of our own research, we find that federal courts applying New York law adopt the "injury-in-fact" theory as triggering coverage

under a CGL policy. *See, Maryland Casualty Co. v. W.R. Grace & Co.*, 794 F. Supp. 1206 (S.D.N.Y.1991) (and cases cited therein). The injury-in-fact theory was first advanced in *American Home Products Corp. v. Liberty Mutual Ins. Co.*, 565 F. Supp. 1485 (S.D.N.Y.1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984) *("AHP")*. In *AHP*, Judge Sofaer held that actual injury during the relevant policy period triggers coverage under New York law. In other words, at the time an injury actually occurs, the applicable policy is, in effect, triggered. It is of no consequence whether the injury has been discovered or not. According to *AHP*, "a real but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish coverage, irrespective of the time the injury became [diagnosable]." *AHP*, 748 F.2d at 766 (quoting *AHP*, 565 F. Supp. 1485, 1497 (S.D.N.Y.1983). Applying the above standard to P & I policies, we hold that injury-in-fact during the policy period triggers coverage.

Asbestosis Claimant's request that we apply exposure in residence (continuous trigger) to the facts of this case is without merit. Continuous trigger has been explicitly rejected in New York in several courts. In *AHP*, the court rejected *Keene* as "result-oriented" and ruled that "relying on social policy to justify imputing an expectation of complete coverage to the insured is . . . legally insupportable." *AHP*, 565 F. Supp. at 1511. The District of Columbia Circuit, the court that decided *Keene*, has also rejected the application of *Keene's* continuous trigger in cases applying New York law. In *Abex Corp. v. Maryland Casualty Co.*, 252 U.S. App. D.C. 297, 790

F.2d 119 (D.C. Cir. 1986), the D.C. Circuit found the *Keene* decision "inconsistent" with *AHP* and New York's injury-in-fact standard.

Although we note that Asbestosis Claimants' continuous trigger theory has support in other jurisdictions,[6] New York clearly applies the injury-in-fact trigger to cases involving exposure to hazardous substances like asbestos. Moreover, our research finds that recent New York decisions concerning the trigger issue, including *Stonewall Insurance Co. v. National Gypsum Co.*, 1992 WL 123144 (S.D.N.Y. 1992), also support the injury-in-fact theory. There is ample support for our conclusion that exposure to asbestos and accompanying injury-in-fact during any of the relevant policy periods triggers coverage under the applicable P & I policies. *See, Maryland Casualty Co. v. W.R. Grace & Co.* and *AHP, supra* (and cases cited therein).

The parties agree that exposure to asbestos causes physical injury. It is also a matter of law that injury-in-fact in the form of tissue damage occurs simultaneously or soon after asbestos inhalation.[7] *See, Insurance Co. of North America*

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[6] *See, D'Amiante du Quebec, Ltee. v. American Home Assurance Co.*, 613 F. Supp. 1549 (D.N.J. 1985), *vacated*, 864 F.2d 1033 (3d Cir. 1988).

[7] *See,* Agreed Statement of Facts, page 8. In their briefs to the Court, both parties state that injury from asbestos occurs immediately or shortly after exposure. This view coincides with several court decisions concerning the issue, including *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109, 102 S. Ct. 686, 70 L.Ed.2d 650 (1981).

v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1222 (6th Cir. 1980), *modified on rehearing*, 657 F.2d 814, *cert. denied*, 454 U.S. 1109 (1981). We therefore need not decide when injury-in-fact occurs.

Applying the injury-in-fact trigger to the facts of this case, we note that multiple policies may be triggered for some claimants. Typically, PLI employed merchant marines on a given ship for intervals of several weeks, after which time many worked on other PLI ships or for other shipping companies. Over the course of a merchant marine's employment, exposure to asbestos may have occurred on numerous vessels owned by various shipping companies. If a seaman were exposed to asbestos on more than one ship during any of the ships' insurance years, then more than one P & I policy would be triggered for that individual claimant. When PLI purchased a P & I policy from American Club, it purchased insurance for losses arising during the one-year term of the insurance contract. Nothing in the policies states that future P & I policies would be triggered for injuries occurring outside the coverage period. The terms of each policy speak for themselves.

New York law requires that we construe the P & I policy as a whole according to the reasonable businessperson standard. *Avondale Indus., Inc. v. Travelers Indem. Co., supra*, 697 F. Supp. 1314, 1319. We are not at liberty to alter the terms of the parties' agreement under the guise of contractual construction. Although it is true that courts construe ambiguous language against the insurer, we find no ambiguity in the policy

regarding the trigger issue. In the light of the yearly term of each P & I policy relevant here, it is unreasonable that subsequent policies would be triggered for losses arising from a prior insurance period. The language of the policy provides that liability arising during the contract term triggers coverage. Rewriting the policies to require indemnification for losses occurring outside the policy period would violate this state's rules of construction as well as New York's general rule that injury-in-fact during the policy term triggers coverage.

II. Coverage Allocation

The second issue before us concerns allocation of coverage. The allocation issue flows from the fact that numerous exposed PLI seamen worked on more than one PLI ship during various insurance years. Given the fact that exposure occurred on different ships and therefore under different policies, the parties request a determination of whether liability should be allocated among or between the policies when more than one policy is triggered.

American Club argues that its duty to indemnify should be allocated pro rata according to each claimant's sea service and exposure on PLI and other insured vessels. The Club bases its position in part on the "other insurance" clause found in the relevant P & I policies. Under this theory, if more than one policy is triggered, the Club need indemnify PLI only to the extent that exposure occurred on any given insured ship during its policy period. All triggered policies would then contribute to indemnify PLI for amounts

paid according to the amount of time a particular seaman spent on PLI vessels as a proportion of the time he was exposed to asbestos. Each triggered policy would contribute in proportion to its policy limit to indemnify Trustee for the loss.

Asbestosis Claimants argue that American Club is liable under each and every triggered policy to the extent of coverage, without allocation. In sum, Asbestosis Claimants request that we apply joint and several liability to all policies. Claimants cite several cases that support their position, none of which concern New York law or P & I policies.

To our knowledge, no other court has resolved a similar issue of allocation within the marine insurance setting. We therefore begin our analysis with the plain meaning of the relevant policy provisions. The P & I policies provide that American Club "agrees to indemnify [PLI] against any loss, damage or expense which [PLI] shall become liable to pay . . ." Each P & I policy is thus triggered by the loss, damage, or liability during the applicable term of the policy. It follows that when American Club becomes liable during a policy for a claimant's asbestos injury (the injury in fact), "any loss" attributable to that liability must be indemnified under the policy according to applicable deductibles and policy limits.

As noted earlier, PLI seamen often worked on more than one vessel, sometimes even in the same calendar year. It is therefore probable that many seamen were exposed to asbestos on more than one vessel during the same or different policy years. Whether this additional exposure con-

tributed to further injury or exacerbated earlier injury is an unresolved question of fact. This uncertainty gives rise to the issue of whether coverage under triggered policies should be allocated so that coverage mirrors exposure periods and therefore the severity of injury. American Club advocates allocation that would base payment for a given injury on the length of time that an individual was exposed to asbestos, relative to exposure on other ships during the same or other insurance years.

According to Asbestosis Claimants' theory, when a seaman is exposed to asbestos on a PLI vessel during one year and then is exposed to asbestos on non-PLI vessels during subsequent years, American Club would become jointly and severally liable to pay all damages flowing from the exposures on all vessels. In addition, if the seaman served on PLI vessels for a continuous span of years, in any given insurance year PLI could incur liability for all the claimants' asbestos-related damages.

In New York, losses covered by more than one insurance policy are sometimes allocated to each triggered policy according to the proportion of the estimated injuries occurring under each policy. *Uniroyal, supra,* 707 F. Supp. at 1392. The courts in New York generally hold that each excess policy must contribute in proportion to its limit amount of insurance. *Hausman v. Royal Ins. Co.,* 153 A.D.2d 527, 544 N.Y.S.2d 605, 607 (N.Y.A.D. 1st Dept. 1989); *Hospital Underwriters Mutual Ins. Co. v. National Casualty Co.,* 150 A.D.2d 636, 541 N.Y.S.2d 512, 513 (N.Y.A.D. 2d Dept. 1989).

The special facts of this case, however, dictate that we not follow *Uniroyal* here. In contrast to the facts in *Uniroyal,* each Club policy was a separate indemnity contract covering losses during a particular term. In the early years of the parties' business relationship, most policies insured one named vessel during a one-year period. In later decades, it was common for American Club to issue a single yearly policy for all ocean-going ships. In both cases these policies were not interrelated except to the extent provided in the "other insurance" clause.

We interpret the other insurance clause to refer to concurrent policies that PLI may have carried that also covered losses occurring during the term of a triggered P & I policy. The clâuse is therefore inapplicable to other P & I policies issued to insure the same or other vessels during different insurance periods. For example, if PLI carried two P & I policies on the same vessel for the same insurance year, then the other insurance clause would become relevant. To the best of our knowledge, we are not presented with that situatior here.

Without language that mandates allocation, we find little support for American Club's position. We therefore hold that American Club is liable under each P & I policy for the entire injury sustained during a triggered policy period. Our holding, however, is subject to one limitation.

Under the special facts and circumstances of this case, some fair and appropriate means of allocation may be used if evidence presented at trial can specifically identify and quantify the actual injury sustained during a given policy

period relative to other triggered policies. If medical evidence cannot differentiate between or among known exposures and their resulting injuries, as we suspect, then each triggered policy shall be liable for the full amount of the claim up to its stated policy limit. In these circumstances, the liability of each insurer would be joint and several. If evidence, however, is able to identify and quantify the extent of injury during a given policy period, then, subject to policy limits, deductibles, and "other insurance" clauses, each triggered policy must respond to the claimant's losses according to an estimate of the damages occurring during the policy term in proportion to the policy limit of each P & I policy. *See, Sandoz, Inc. v. Employer's Liability Assurance Corp.*, 554 F. Supp. 257 (D.N.J.1983).

Our holding rejects the automatic pro rata allocation adopted in *Insurance Co. Of America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (1981), *cert. denied*, 454 U.S. 1109, 102 S. Ct. 686, 70 L. Ed. 2d 650 (1981) *("Forty Eight")* in a claim by the insured. *Forty Eight* may be an appropriate standard when considering claims among the insurers, but not when considering a claim by the insured. We instead seek to avoid an arbitrary pro rata method based on the assumption that bodily injury reflects asbestos exposure in a linear fashion. We have no facts with which to make this determination, and thus the issue is inappropriate for summary judgment.

American Club is liable under each P & I policy to indemnify for damages flowing from exposure during policy periods. An accurate determination

of when injury occurred will require evidence on the progress of the disease. If medical evidence can establish the timing of injury, each policy will be liable only for damages occurring during the policy period. The liability under a given P & I policy would not be affected by the existence or nonexistence of prior or subsequent coverage. The parties' respective motions for summary judgment on the issue of allocation are therefore denied.

III. Policy Deductibles

In the third issue presented, the parties request a determination concerning the application of policy deductibles. The deductible clause in the relevant P & I policies provides (e) Claims hereunder . . . are subject to a deduction of $with respect to each accident or occurrence." The terms "occurrence" and "accident" are not defined within the four corners of the P & I policies.

Asbestosis Claimants suggest that we adopt a definition of occurrence analogous to that found in CGL policies, in which occurrence is generally defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury . . ." *Abex,* 790 F.2d at 122; *American Motorists, supra,* 406 N.Y.S.2d at 659. Under this construction, Claimants argue that the condition of asbestos on all PLI vessels is a single occurrence. Claimants then conclude that there is a single deductible per policy, regardless of the number of asbestos claims filed against a given policy.

American Club offers a narrower interpretation of occurrence. According to the Club, each individual exposure to asbestos constitutes a separate occurrence. The Club concedes, however, that it is reasonable to construe the term occurrence to mean that "the total exposures of the seaman throughout the policy year are considered one accident or occurrence, regardless of the number of voyages or vessels involved." Under this interpretation, each seaman's claims would be subject to one deductible. We believe this interpretation, however, improperly equates the words "claim" and "occurrence."

The Club also asserts that CGL policies are inapplicable in the present dispute because they are based on an expanded definition of occurrence. Instead, the Club asks us to construe occurrence in accordance with the "unfortunate event" test applied in *Hartford Accident & Indemnity Co. v. Wesolowski*, 33 N.Y.2d 169, 350 N.Y.S.2d 895, 305 N.E.2d 907 (1975). The unfortunate event test states that there is one accident or occurrence if there has been but a single "event of an unfortunate character that takes place without one's foresight or expectation." We are uncertain, however, of the benefit to the Club's position if we were to accept the unfortunate event test. In *Wesolowski*, the New York Court of Appeals held that a multiple-car accident constituted one continuous event or occurrence for purposes of calculating an insurance deductible. Applying this test to the present case, it is reasonable to conclude that the presence of asbestos on PLI vessels constituted one continuous unfortunate event, thus constituting one

occurrence and the application of only one deductible. If anything, the *Wesolowski* holding supports Asbestosis Claimants' position, not that of American Club.

American Club also argues that the words "claims hereunder" mandate that we apply the deductible to each claim rather than each occurrence. We disagree. The words "claims hereunder" merely mean that the deductible applies to claims filed under that particular P & I policy. They do not void subsequent language that makes the deductible applicable to "each accident or occurrence." *See, Export S.S. Corp. v. American Ins. Co.*, 35 F. Supp. 422, 424 (S.D.N.Y. 1940).

Finally, American Club suggests that we apply the practice of the Club's Board of Directors and apply the deductible per asbestos claimant. Although the Club's practice is certainly relevant in construing an ambiguous provision, we find the deductible clause unambiguous and plain on its face. We therefore cannot look to circumstances external to the contract. *AHP, supra,* 565 F. Supp. at 1500. In addition, evidence from a particular course of dealing can be misleading, especially when construing insurance contracts covering liability for insidious diseases. *AHP,* 565 F. Supp. at 1503.

American Club's contention that calculation of the number of occurrences turns on the number of claims is not supported by New York law. It is well settled that in determining the number of occurrences for deductibles, the focus should be on "the underlying circumstances which resulted in the claim for damages" rather than on the

number of persons injured. *Champion International Corp. v. Continental Casualty Co.*, 546 F.2d 502, 506 (2d Cir.1976), *cert. denied*, 434 U.S. 819, 98 S. Ct. 59, 54 L. Ed. 2d 75 (1977) *("Champion")*. The law of New York defines occurrence as the underlying event that ultimately results in a filed claim or claims. A claim and an occurrence are conceptually different terms. *See, Uniroyal, supra,* 707 F. Supp. at 1382-83.

Several courts applying New York law have concluded that in mass toxic tort exposure cases all exposures to the harmful substance constitute one occurrence when determining applicable deductibles. In *Uniroyal, supra,* Judge Weinstein applied the definition of occurrence found in a CGL policy to claims based on exposure to Agent Orange, a defoliant widely used in Vietnam. *Uniroyal* held that the delivery of Agent Orange to the United States military constituted a single occurrence, regardless of the number of actual deliveries, the number of times the chemical was sprayed in Vietnam, or the number of soldiers exposed to the substance. *Uniroyal,* 707 F. Supp. at 1382-83. *Uniroyal* strongly supports Asbestosis Claimants' position that the presence of asbestos on PLI vessels was a single event or occurrence.

Also, in *Champion, supra,* the court construed a CGL policy similar in form to the policy interpreted in *Uniroyal.* The court held that providing for deductibles "per occurrence" rather than "per claim" evidenced an intent to afford coverage not on the basis of individual claims, but rather on the underlying circumstances which resulted in

the claim for damages. *Champion,* 546 F.2d at 505-6. Accordingly, the Second Circuit held that Champion's sale of vinyl-covered paneling to vehicle manufacturers, precipitating the damage claims of 1,400 consumers, constituted a single occurrence. *Id.* at 506.

The holding expressed in *Champion* is by no means atypical and finds support in other jurisdictions. For example, in *Transport Insurance Co. v. Lee Way Motor Freight,* 487 F. Supp. 1325, 1330 (N.D.Tex.1980), the court stated:

> the great majority of courts have held that where a single event, process or condition results in injuries, it will be deemed a single occurrence even though the injuries may be widespread in both time and place and may effect a multitude of individuals.

Our review of additional caselaw supports this conclusion. *See, Stonewall Ins. Co. v. National Gypsum Co.,* 1992 WL 123144 (S.D.N.Y.1992) (not reported in Bankr.).

In the light of the above decisions, we conclude that a court should look to the underlying event rather than individual claims when defining an occurrence. The test in New York for determining what constitutes this underlying event or occurrence was first set forth in *Author A. Johnson Corp. v. Indem. Ins. Co.,* 7 N.Y.2d 222, 196 N.Y.S.2d 678, 164 N.E.2d 704 (1959). In that opinion, the New York Court of Appeals analyzed prior case law and distinguished three classes of decisions. The first class of decisions found a separate accident for each negligent act or omission; the second class of cases found a separate acci-

dent for each injury; and the third group of cases found a separate accident for each "event of an unfortunate character." *Johnson,* 196 N.Y.S.2d at 683. After weighing the merits of each case, the Court of Appeals adopted the "unfortunate event" test for determining what constitutes an accident. This test, the Court concluded, "corresponds most closely with what the average person anticipates when he buys insurance and reads the accident limitation in the policy." *Johnson,* 196 N.Y.S.2d at 684. Similarly, in *Hartford Accident & Indemnity Co. v. Wesolowski,* 33 N.Y.2d 169, 350 N.Y.S.2d 895, 305 N.E.2d 907 (1973), the Court of Appeals applied the "unfortunate event" test to "occurrence" as well as "accident."

The parties offer little evidence concerning the meaning they attach to the term "occurrence." Although we find the term unambiguous, we note that if we were to conclude that "occurrence" is ambiguous, we would construe the ambiguity in a manner that favors the insured and permits recovery, so long as the construction is reasonable. *Uniroyal,* 707 F. Supp. at 1377; *Miller v. Continental Ins. Co.,* 40 N.Y.2d 675, 389 N.Y.S.2d 565, 567, 358 N.E.2d 258 (1976); *Ideal Mutual Ins. Co. v. Last Days Evangelical Association,* 783 F.2d 1234, 1238 (5th Cir.1986). Applying this presumption given the plain meaning of the policies, we conclude that the occurrence was the presence of asbestos on each PLI vessel during each triggered policy period. We therefore hold that each P & I policy obligated to indemnify will be able to claim one deductible, irrespective of

the number of claims filed against an individual policy.

The fact that numerous claims have been filed against American Club necessitates that we discuss the Trust's liability, as successor to PLI's interests, for applicable deductibles. We believe that the one deductible owing under each triggered policy should be allocated among all claimants according to the percentage that each claim takes relative to the policy limit. For example, if an individual receives 3% of the policy limit as compensation for his asbestos related injuries, the Trust will be responsible for 3% of the deductible amount for the underlying occurrence. Allocation of deductibles will apply for each policy regardless of whether coverage is allocated based on multiple exposure or whether coverage is based on joint and several liability.[8]

Our holding concerning allocation of deductibles is supported by the plain language of the relevant P & I policies. Each policy applies a deductible "with respect to each accident or occurrence." To adopt American Club's position, we would have to rewrite the deductible clause to require a deductible for each claim. We are not at liberty, however, to adopt a construction of an insurance policy that is inconsistent with the contract's plain meaning. *AHP,* 565 F. Supp. at 1492. In providing for deductibles "with respect to each occurrence," we conclude that the parties intended that the deductible apply for each underlying event, rather than per claim. *See, Champion International, supra,* 546 F.2d at 505.

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[8] *See, supra,* issue two concerning allocating coverage.

Accordingly, we find the deductible clause unambiguous and award summary judgment in favor of Asbestosis Claimants.

IV. The Liman and Other Plan Provisions

The fourth issue before us concerns the enforceability of certain Plan provisions. In the action for declaratory relief, Trustee requests a judgment that certain provisions of the P & I policies are unenforceable under the Plan. Specifically, Trustee asserts that (1) Trustee is not obligated to pay claims prior to seeking reimbursement from American Club and (2) American Club is obligated to pay directly to the appropriate claimant all amounts of his or her allowed claim, less any applicable deductible.

According to American Club, the Plan does not alter the rights and obligations of the parties under the relevant policies and applicable law. First, Club states that the Claimants do not have a direct right of action under the P & I Policies against it. Second, Club argues that the Plan does not alter the requirement that the Trustee pay a claim before Club is obligated to indemnify. Third, American Club argues that the so-called "Liman" arrangement in the Plan, which operates to satisfy the "pay first" obligation, should not be enforced for claims preceding the 1977 insurance year.

We begin our analysis with the applicable Plan provisions. Section 4.05.03, states the following in pertinent part:

> . . . subject to possible defenses to payment Clubs or other insurers may have, holders of

> Insured Claims in Class 5C . . . may be entitled to payment in cash of Excess Claims,[9] directly or indirectly, from Clubs or other insurers.

Section 4.05.07(a)(i) provides, in pertinent part,

> Subject to the remainder of this Sec. 4.05.07(a) of the Plan and the terms of the PLI Disbursement Trust Agreement, the PLI Disbursement Trust will succeed to all insurance rights of PLI . . . in existence as of the Effective Date, including any such rights to indemnification, reimbursement, contribution, or other payment in respect of any Personal Injury Claim or Cargo Damage Claim and any other such rights PLI may have to receive payment . . .
>
> * * *
>
> Subject to the rest of this Sec. 4.05.07(a) of the Plan, the PLI Disbursement Trustee is authorized to enter into agreements with one or more Clubs or other insurers . . . which agreements provide in substance that holders of Allowed Insured Claims have Allowed Claims in Class 5C for the Deductible Claim and that the Club or other insurer shall make cash payments, directly or indirectly, to the holder of the Allowed Insured Claim for any Excess Claim.

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[9] "Excess Claim" is defined in the Plan as the amount by which the Allowed Insured claim exceeds the deductible.

The PLI Trust Agreement assigned to Trustee "all rights, contractual or otherwise, of PLI *existing as of the Effective Date* under or with respect to any policy issued by . . . any insurer . . ." (emphasis ours).

In substance, these provisions provide that Trustee shall succeed to PLI's rights in the P & I policies, but only to those rights PLI already had as of the effective date of a valid insurance policy. While the Plan permits Trustee to enter into an arrangement with the Club to provide direct payment to Asbestosis Claimants, nothing in the Plan obligates club to agree. Thus, we hold that the Plan does not alter Club's contractual obligations as they exist under the P & I policies and applicable law.

Under the P & I policies, American Club is obligated to reimburse or indemnify Prudential only after PLI has made payment and made a claim on American Club. The policy provides, in relevant part,

> the Association agrees to indemnify the assured against loss, damage or expense which the assured shall become liable to pay *and shall pay* by reason of the fact that the assured is the owner . . . (emphasis ours).

In *Miller v. American S.S. Owners Mutual Protection And Indemnity Co.*, 509 F. Supp. 1047 (S.D.N.Y. 1981), the Court held that a policy with identical language was a policy of "indemnity" under New York law. 509 F.Supp. at 1048. It is well settled under New York law that an insured cannot recover under a general indemnity policy until the insured has actually paid the underly-

ing claim. *See, Miller*, 509 F. Supp. at 1049; *Cucurillo v. American Steamship Owners Mutual Protection & Indemnity Assoc.*, 1969 AMC 2334, 2335 (Sup. Ct. N.Y. County 1969); 23 NY Jur 2d, Contribution, §§ 65,66. We hold that, except to the extent that American Club otherwise agrees, Trustee must pay an Allowed Insured Claim before American Club will be obligated to indemnify or reimburse the Trust.

Recognizing that American Club may refuse, in accordance with the P & I policies, to indemnify PLI unless the Trust "pays first," the Plan contains a so-called *"Liman"* provision under Section 4.05.07, which provides, in pertinent part,

> the PLI Disbursement Trustee is authorized to enter into arrangements under which in substance the PLI Disbursement Trust pays the Allowed Insured Claim in full in cash; the holder of the Allowed Insured Claim repays in cash the full amount of the Deductible Claim and the Club or other insurer reimburses the PLI Disbursement Trust in cash for the full amount of the Excess Claim (and any previously unreimbursed defense costs in excess of the applicable deductible incurred in connection with liquidation of the Claim); and the holder of the Allowed Insured Claim is given an Allowed Claim in Class 5C in the amount of the Deductible Claim.

In *Liman v. American Steamship Owners Mutual Protection and Indemnity Assoc.*, 299 F. Supp. 106 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 627 (2d Cir. 1969), *cert. denied*, 397 U.S. 936, 90 S.

Ct. 946, 25 L. Ed. 2d 116 (1970) *("Liman")*, which involved an almost identical P & I policy, the Court upheld a plan provision in which personal injury claimants of a debtor would agree that, in the event of a recovery against the debtor, the estate would pay the full amount of the recovery to the claimant and the claimant would thereupon repay the applicable deductible to the estate, in exchange for which the claimant would receive an unsecured claim against the estate in the amount of the deductible. *Liman*, 299 F. Supp. at 108.

American Club argues that the Liman provision should not be enforced against the Club because (1) the Plan permits the Trustee to enter into *Liman* arrangements with insurers, but does not bind the insurers to agree and (2) *Liman*, though binding on this Court, was wrongly decided and should therefore not be applied to P & I policies prior to the 1977 insurance year. We reject both arguments.

While the Plan does not obligate Club to "agree" to enter into a *Liman* arrangement, neither does it require the Club's agreement. The *Liman* provision, set forth above, further provides,

> The PLI Disbursement Trustee shall enter into no such arrangement and shall make payment of no such Claim unless it obtains satisfactory assurances and documentation that the PLI Disbursement Trust shall promptly receive in cash repayment and/or reimbursement of the full amount of the Allowed Insured Claim paid by the . . . Trust.

* * *

> The . . . Trustee may alternatively enter into any lawful arrangement designed to achieve the same purpose, as may be agreed upon by the holder of an Allowed Insured Claim and the . . . Trustee, but . . . may not use funds of the . . . Trust . . . unless adequate assurances and documentation are provided ensuring that the . . . Trust will promptly receive repayment and/or reimbursement of all amounts paid by the . . . Trust.

The Plan requires only that Trustee obtain assurances of prompt reimbursement before it pays a claimant. It does not require Trustee to obtain such assurances only upon the consent of the Club. We think the P & I policies themselves can be the basis of adequate assurances. The policies obligate American Club to indemnify the insured—the Trustee in our case—if the insured pays a claim which is covered under the terms of the policy. Should the Club refuse to provide indemnity in breach of its obligations under the policies, we have no doubt that we possess the necessary power to provide adequate assurance of reimbursement. 11 U.S.C. § 105(a). We therefore hold that Trustee may enter into *Liman* arrangements regardless of whether the Club itself provides assurances of prompt reimbursement.

We also find little merit in the Club's second argument concerning the correctness of the *Liman* decision. The District Court, in support of its holding in *Liman*, commented that the insurer

should not be permitted a windfall by escaping its obligation to pay on policies on which the insured had paid substantial premiums. *Liman*, 299 F. Supp. at 109. We agree. Summarizing the relevant law, the Court said,

> the courts of New York have repeatedly held that an insured fulfills his obligations under an indemnity policy and is entitled to reimbursement when a judgment against him has been satisfied, and the insurer may not escape its obligation to indemnify by showing that the payment made by the assured was advanced to it by a third party or financed in some other fashion.

299 F. Supp. at 109 ; citing, *Employers' Liability Assurance Corp., Ltd. v. International Milk Products Co.*, 192 A.D. 88, 182 N.Y.S. 337, 339 (N.Y.A.D. 1st Dept. 1920). According to the District Court, the insured on an indemnity policy "was at liberty, so far as the [insurer] is concerned, to borrow the money and pay the judgment, even though it was insolvent, or on the verge of insolvency." *Liman*, 299 F. Supp. at 109 (other citations omitted). Applying this rule, the Court held "the test in New York is whether the assured has actually in good faith sustained the loss for which reimbursenent is sought . . ." *Liman*, 299 F. Supp. at 109.

We think *Liman* was correctly decided under the purpose and spirit of New York law. If the insured pays the claim, whether with or without funds borrowed from Claimants, it has satisfied the plain language of the policy. Club has not cited a single valid authority for its position that

the "pay first" provision of an indemnity policy is not satisfied when an insolvent insured borrows funds to make an actual payment. Accordingly, we hold that the *Liman* provision in the Plan is valid and enforceable as to all policies.

V. Setoff

The fifth issue before us concerns setoff under 11 U.S.C. § 553. American Club argues that it is entitled to offset the 1979, 1983, 1984 and 1985 past-due premiums and assessments against the benefits to be paid the Asbestosis Claimants under fully paid policies for different insurance years. Club also argues that executory contract law favors setoff.

The facts relevant to the setoff issue are as follows. The parties have stipulated, for the purposes of this declaratory judgment action only, that the Club currently has a net claim against PLI of $1,270,980 for unpaid premiums and assessments. The past due premium concerns the calendar year 1985. The unpaid assessments are due on the policies in effect in 1979, 1983, 1984, and 1985. These assessments were "levied" from 1985 through 1990.

Asbestosis Claimants have not sought collection on policies for which premiums have not been paid. Claimants agree that setoff would be proper if recovery were sought from past-due policies. Claimants also agree that Club is not liable for claims under policies issued for 1979, 1983, 1984 and 1985, subject to benefits being offset against premiums and assessments due according to the four policies. Asbestosis Claimants do not, however, agree that unpaid

premiums and assessments should be offset against American Club's obligations to pay claims under fully paid policies. According to Claimants, each yearly P & I policy was a separate contract. Except for the four policies for which premiums were not paid, PLI satisfied all terms and conditions contained in the agreements.

The right to offset one's debts against corresponding debts owed a debtor was stated as early as 1675 in Anonymous, 86 Eng. Rep. 837; [K.B.]. *Matter of Midland Ins. Co.*, 167 A.D.2d 75, 569 N.Y.S.2d 951 (N.Y.A.D. 1st Dept. 1991), *aff'd*, 79 N.Y.2d 253, 582 N.Y.S.2d 58, 590 N.E.2d 1186 (1992). Today, the right to offset mutual debts lives and prospers in both Bankruptcy and state law.

Under the Bankruptcy Code, a creditor's right to setoff is governed by 11 U.S.C. § 553, which provides, in relevant part,

> (a) Except as otherwise provided in this section and in section 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . .

Section 553 has two general requirements. First, the creditor's debt to the debtor and the creditor's claim against the debtor must both arise before the commencement of the case. *In re Drexel Burnham Lambert Group, Inc.*, 113 Bankr.

830, 22 Collier Bankr. Cas. 2d (MB) 1708, 20 Bankr. Ct. Dec. (CRR) 788; Bankr.L.Rep. P 73,392 (Bankr.S.D.N.Y.1990). Second, the debts and claim must be mutual; that is, they must in the same right and between the same parties, standing in the same capacity. *Modern Settings v. Prudential-Bache Securities,* 709 F. Supp. 70, 75 (S.D.N.Y.1989), *aff'd in part and rev'd in part,* 936 F.2d 640 (2d Cir. 1991), *citing,* 4 *Collier on Bankruptcy* (14th Ed. 1978) P 68.04[21] at 867.

Section 553 permits setoff of unrelated claims if mutuality exists. *In re Interstate Record Distributors, Inc.,* 307 F. Supp. 1142 (S.D.N.Y.1970), *aff'd,* 430 F.2d 1017 (1970). As noted by Judge Cardozo, "to be mutual, they must be due to and from the same persons in the same capacity." *Beecher v. Vogt Mfg. Co.,* 227 N.Y. 468, 473, 125 N.E. 831. Mutuality does not require, however, that the debts arise out of the same transaction. Mutual debts contemplated in the case of setoff are generally those arising from different transactions. Debts arising from the same transaction that may or may not be mutual are subject to recoupment. *See,* 4 *Collier on Bankruptcy,* § 553.03 (15th Ed.).

Setoff rights are determined as of the date of the filing of the bankruptcy petition. *In re Denby Stores,* 86 Bankr. 768, 791 (Bankr.S.D.N.Y.1988). When a creditor's debt arises post-petition, it is owed to the debtor-in-possession and therefore lacks the requisite mutuality with pre-petition claims of the creditor against the debtor. 4 Collier of Bankruptcy (15th Ed. 1991), para. 553.08[1]; *In re O.P.M. Leasing,* 68 Bankr. 979,

986 (Bankr.S.D.N.Y. 1987). A post-petition claim is therefore improper for setoff.

As provided in the statute, § 553 is not an independent source of setoff rights. The Bankruptcy Code simply preserves the common law right of setoff under applicable nonbankruptcy law. *In re Drexel Burnham Lambert Group, Inc., supra,* 113 Bankr. 830, 839.

The applicable nonbankruptcy set-off law is "determined by applying the law of the state where the operative facts occurred." *In re Williams,* 61 Bankr. 567, 571, 15 Collier Bankr. Cas. 2d (MB) 70 (Bankr.N.D. Tex.1986). Here, the P & I policies were entered into in New York, which is also the Club's principal place of business. We therefore look to New York law to determine American Club's right of setoff.

New York recognizes both equitable and statutory set-off. Statutory setoff is governed by Debtor and Creditor Law § 151, which provides,

Every debtor shall have the right upon:

> (a) the filing of a petition under any of the provisions of the federal bankruptcy act or amendments thereto . . . by or against a creditor . . .
>
> * * *
>
> to setoff and apply against any indebtedness, whether matured or unmatured, of such creditor to such debtor, *any amount owing* from such debtor to such creditor, *at or after,* the happening of [the filing of a bankruptcy petition].
>
> * * *

> the . . . right of set off may be exercised by such debtor against such creditor or against any trustee in bankruptcy [or] debtor in possession . . . claiming through or against such creditor or such trustee in bankruptcy [or] debtor in possession . . .

New York Debtor and Creditor Law, § 151 (McKinney's Supp. 1991) (emphasis ours).

To be available for setoff under § 151, PLI's debt to American Club can be matured or unmatured, but it cannot be contingent. *Trojan Hardware Co. v. Bonacquisti Construction Corp.*, 141 A.D.2d 278, 534 N.Y.S.2d 789, 791 (N.Y.A.D. 3rd Dept. 1988). An unmatured debt is generally evidenced by a contract and can be expected in the normal course of events to be due and owing in the future, although the obligation has not yet ripened. A contingent liability, however, is marked by uncertainty as to whether any obligation will ever arise. *Id.*

Under § 151, PLI's debts for premiums and assessments may only be offset against an indebtedness "owing" from the Club to PLI, or any entity claiming through PLI. The statute does not, however, give any indication of when a debt is "owing." Courts applying principles of equitable setoff have generally held that, where the debt is owed to an insolvent, it is available for setoff even if unmatured. *Gerseta Corp. v. Equitable Trust Co.*, 241 N.Y. 418, 422, 150 N.E. 501 (1926); *Siegel v. State of New York*, 262 A.D. 388, 391; 28 N.Y.S.2d 958 (N.Y.A.D. 3rd Dept. 1941).

At the time of its bankruptcy petition, PLI's debts to American Club were either matured or unmatured, but none were contingent. On the date of its petition, PLI was indebted for unpaid premiums on the 1985 policy. PLI's debts for unpaid assessments, some of which did not become due until post-petition, were contractual obligations undertaken by PLI on the P & I policies during the years 1979 and 1983 through 1985. Thus, those debts for assessments that did not become due until post-petition were nonetheless unmatured claims as of the debtor's bankruptcy. They have since become matured claims.

Applying New York Debtor and Creditor Law § 151 to the facts of this case, we conclude that the debt must be owing at or after PLI's bankruptcy to warrant setoff. We therefore hold that American Club may offset unpaid premiums and assessments against sums payable to Trustee and Asbestosis Claimants under triggered policies.

American Club's right of setoff, however, exists subject to the insurer's obligations under the relevant policy agreements. If American Club chooses to exercise this right of setoff, the 1979, 1983, 1984, and 1985 policies are obligated, subject to our holdings, *supra*, to indemnify the Trust for asbestos injuries occurring following exposure during those insurance years.

We reach this conclusion because of the following two facts. First, Club's position that it was not obligated under the 1979, 1983, 1984, and 1985 policies to pay asbestos claims rests on PLI's nonpayment of premiums and assessments.

If American Club were to offset the amounts owing for premiums and assessments against payments for asbestos claims, Club could no longer use nonpayment as a reason not to indemnify under the relevant policies if coverage were triggered. Second, the relevant P & I policies require that American Club cancel policies via written notice.[10] No evidence of cancellation has been submitted by either party. We therefore must assume, under summary judgment standards, that the 1979, 1983, 1984, and 1985 policies may be revived by payment of the past due premiums and assessments, thus renewing American Club's obligation to indemnify the Trust for payments made to Asbestosis Claimants.

American Club also argues, under the doctrine of *cum onere,* that the insurance policies relevant here are executory contracts that must be accepted or rejected in full. The Club concludes that PLI Trustee must assume all P & I policies as an aggregate to reap the benefits of the policies. We find little merit in this position.

The insurance policies American Club issued to PLI were separate and distinct contracts. No policy language conditions indemnification on the

[10] For example, a 1979 P & I policy provides the following:

> In the event of non-payment of the full premium within sixty (60) days after attachment, or, if installment payment of the premium has been arranged, in the event of non-payment of any installment thereof within twenty (20) days after it was due, this policy my be cancelled by the Association upon five (5) days written notice being given the Assured . . .

See, Exhibit C, Agreed Statement of Facts, P 29(b).

payment of premiums and assessments due under different policies. Each policy contained its own period of coverage, deductible, and policy limit. Trustee is therefore free to choose among the paid policies for ultimate indemnification of asbestos claims according to his determination of which policies benefit the estate. Trustee need not assume the unpaid policies to receive the benefits owing from triggered P & I policies.

We conclude that American Club is entitled to partial summary judgment concerning the setoff issue. If American Club chooses to exercise this right of setoff, the amount of unpaid premiums and assessments, stipulated by the parties as $1,270,980, shall be offset against payments made by American Club under all triggered P & I policies. Setoff will, however, resuscitate the Trust's rights to receive contractual benefits under these policies, including rights to indemnification for amounts paid to Asbestosis Claimants for personal injuries. If requested, American Club's motion for relief from the automatic stay to permit setoff of unpaid premiums and assessments will be set for hearing consistent with 11 U.S.C. § 362, *et seq.*

VI. Interest

The sixth and final issue before us concerns whether American Club is entitled to interest accruing post-petition on pre-petition past-due premiums and assessments for 1979, 1983, 1984, and 1985.

Claimants argue that American Club is not entitled to the interest on two grounds. First, the Plan makes no provision for the payment of post-

petition interest. Club should therefore have raised the interest issue at or prior to confirmation, not after. Second, Claimants argue that Club's claim for post-petition interest is actually a request to have its claim treated as an administrative expense. Under 11 U.S.C. § 503(b), administrative expenses are allowed only if they are actual and necessary costs and expenses for preservation of the estate "for services rendered after the commencement of the case . . ." Claimants conclude that earning interest on unpaid premiums and assessments was not necessary for the preservation of the estate.

We agree with Claimants that American Club should have raised the interest issue at confirmation of the Plan, rather than in a motion for summary judgment long after confirmation. Club's request for interest on unpaid premiums and assessments is denied.

CONCLUSION

On the basis of the above findings of fact and conclusions of law, we conclude as follows:

1. American Club's P & I policies were triggered by injury-in-fact occurring during the applicable policy period. Injury-in-fact is exposure to asbestos during an applicable policy period.

2. In cases of multiple exposure during more than one insurance year, coverage under triggered P & I policies will be allocated only if a preponderance of the evidence proves that injuries resulting from asbestos exposure can be linked to a given triggered policy or policies. If

evidence is unable to link exposure during a given period to resulting injury, American Club shall be jointly and severally liable up to stated policy limits for injuries flowing from exposure during any of the triggered policies. Asbestosis Claimants may select among the triggered policies according to standard joint and several liability practice. Summary judgment on the allocation issue is therefore denied.

3. Policy deductibles shall be applied per occurrence. An occurrence is defined as the underlying event that caused the injury. The occurrence was the presence of asbestos on PLI vessels during each policy year. American Club is entitled to one deductible for each of the triggered policies. American Club is not entitled to a deductible for each claim for personal injury arising out of the occurrence. Each P & I policy obligated to indemnify will therefore be able to claim one deductible, irrespective of the number of claims filed against an individual policy. Summary judgment is therefore granted in favor of Asbestosis Claimants.

If evidence shows that allocating coverage is warranted, the deductible amount shall also be allocated on the basis of the same percentage as the allocation of coverage.

4. The "Liman" provision in the Plan is valid and enforceable. Trustee may enter into Liman arrangements regardless of whether the Club itself provides assurances of prompt reimbursement. Trustee may therefore borrow the funds necessary to pay the damages sustained by Asbestosis Claimants to satisfy the "pay first"

provision in the relevant P & I policies. Summary judgment is granted in favor of Asbestosis Claimants.

5. American Club may offset unpaid premiums and assessments against sums payable to Trustee under the provisions of triggered P & I policies. As stipulated by the parties, the amount of the setoff is $1,270,980. If American Club exercises this right to setoff, the Trust is entitled to the contractual benefits of the 1979, 1983, 1984, and 1985 policies.

Partial summary judgment regarding this issue is granted in favor of American Club. American Club's motion for relief from the automatic stay will be set for a hearing, if necessary.

6. American Club is not entitled to post-petition interest on past-due premiums and assessments. The matter should have been raised prior to confirmation of the Plan. Summary judgment on this issue is therefore granted in favor of Asbestosis Claimants.

The parties shall settle an order on five days notice consistent with this Memorandum of Decision.

DATED at New York, New York this 10 day of December, 1992.

Francis G. Conrad
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 86-11773
Adv. Proc. #90-6830A

In Re:

PRUDENTIAL LINES, INC.,

Debtor,

LEE DICOLA, TRUSTEE OF THE
PLI DISBURSEMENT TRUST,

Plaintiff,

AMERICAN STEAMSHIP OWNERS MUTUAL
PROTECTION AND INDEMNITY ASSOCIATION, INC.,

Defendant.

ORDER AND JUDGMENT

Asbestosis Claimants, Intervenors, and American Steamship Owners Mutual Protection and Indemnity Association, Inc., Defendant, ("American Club") having filed cross-motions for Summary Judgment, with Plaintiff, Lee Dicola, Trustee of the Disbursement Trust joining the

Asbestosis Claimants and the issues having been briefed and the Court being fully advised in the premises.

NOW THEREFORE IT IS HEREBY ORDERED, for the reasons set forth in this Court's Memorandum of Decision on Summary Judgment and 11 U.S.C. § 553, issued on December 10, 1992, that:

1. The American Club's Protection and Indemnity Policies were triggered by injury-in-fact occurring during the applicable policy period. Injury-in-fact is exposure to asbestos during an applicable policy period;

2. In cases of multiple exposure during more than one insurance year, coverage under triggered Protection and Indemnity Policies (hereafter "P & I Policies") will be allocated only if a preponderance of the evidence proves that injuries resulting from asbestos exposure can be linked to a given triggered policy or policies. If evidence is unable to link exposure during a given period to resulting injury, American Club shall be jointly and severally liable up to stated policy limits for injuries flowing from exposure during any of the triggered policies. Asbestosis Claimants may avail themselves of any and all of the triggered policies and may select among the triggered policies according to standard joint and several liability practice. Summary Judgment on the allocation issue is therefore denied.

3. Policy deductibles shall be applied per occurrence. An occurrence is defined as the underlying event that caused the injury, which was the presence of asbestos on PLI vessels dur-

ing each policy year. American Club is entitled to one deductible for each of the triggered policies. American Club is not entitled to a deductible for each claim for personal injury arising out of the occurrence. Each P & I Policy obligated to indemnify will therefore be able to claim one deductible, irrespective of the number of claims filed against an individual policy. Summary Judgment is therefore granted in favor of the Asbestosis Claimants.

If evidence shows that allocating coverage is warranted, the deductible amount shall also be allocated on the basis of the same percentage as the allocation of coverage.

4. The "Liman" provision in the Plan is valid and enforceable. Trustee may enter into Liman arrangements regardless of whether the Club itself provides assurances of prompt reimbursement. Trustee may therefore borrow the funds necessary to pay the damages sustained by Asbestosis Claimants from any source, inclusive of a claimant himself, to satisfy the "pay first" provision in the relevant Protection and Indemnity Policies. Summary Judgment is granted in favor of the Asbestosis Claimants.

5. American Club may offset unpaid premiums and assessments against sums payable to Trustee under the provisions of triggered P & I Policies. The amount of the setoff is $1,270,980. If the American Club exercises this right to setoff, the Trust is entitled to the contractual benefits of the 1979, 1983, 1984, and 1985 policies.

Partial Summary Judgment regarding this issue is granted in favor of American Club.

6. American Club is not entitled to post-petition interest on past-due premiums and assessments. Summary Judgment on this issue is therefore granted in favor of Asbestosis Claimants.

/S/ FRANCIS G. CONRAD
Francis G. Conrad
United States Bankruptcy Judge*

Dated: 17 Jan. 93

*Sitting by special designation.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 1481 (CSH), 93 Civ. 7164 (CSH)
July 29, 1994, Decided
July 29, 1994, Filed

IN RE: PRUDENTIAL LINES, INC.,
Debtor.

ASBESTOSIS CLAIMANTS REPRESENTED BY
MARITIME ASBESTOSIS LEGAL CLINIC,
Submitter of First Partial Judgment,

LEE J. DICOLA, TRUSTEE OF THE
PLI DISBURSEMENT TRUST,
Judgment Creditor,

—v.—

AMERICAN STEAMSHIP OWNERS MUTUAL
PROTECTION AND INDEMNITY ASSOCIATION, INC.,
Judgment Debtor.

IN RE: PRUDENTIAL LINES, INC.,

Debtor.

LEE J. DICOLA, TRUSTEE OF THE PLI DISBURSEMENT TRUST,

Judgment Creditor,

—v.—

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC.,

Judgment Debtor.

MEMORANDUM OPINION AND ORDER

HAIGHT, *District Judge:*

These two consolidated appeals present another example of the growing number of cases arising from the havoc wrought by asbestos. The appeals seek review of various decisions of Bankruptcy Judge Francis G. Conrad, sitting by designation in the Bankruptcy Court for the Southern District of New York, made during Chapter 11 bankruptcy proceedings. For reasons detailed below, the bankruptcy court's "Memorandum of Decision on Summary Judgment and 11 U.S.C. § 553" and accompanying "Order and Judgment" are affirmed in part and reversed in part, the Order dated August 4, 1993 and the First Partial Judgment are vacated, and the case is remanded for further proceedings consistent with this opinion.

BACKGROUND

Debtor Prudential Lines, Inc. ("PLI"), a United States shipowning company, consented to an entry of Chapter 11 relief on November 4, 1986. American Steamship Owners Mutual Protection & Indemnity Association, Inc. ("American Club") is a not-for-profit corporation which provides protection and indemnity insurance to its shipowner members. American Club underwrote protection and indemnity ("P & I") policies for PLI ships on an annual basis from 1940 through 1970 and from 1975 through early 1986.

These policies were "assessable" policies, which meant that American Club charged participants premiums based upon the amount necessary to cover claims and related expenses owed in the insurance year. Assessments were levied on participants for a period of several years after the end of an insurance year as necessary to cover the costs of paying claims and related expenses for that particular insurance year. After ten years, when most of the claims for a particular insurance year had been paid, the insurance year was "closed" and a reserve to cover the unpaid claims for that insurance year was transferred to a Reserve Account. Any surplus remaining in the insurance year account was refunded to the participants pro rata according to the premiums each participant paid in the relevant insurance year. Prior to the 1977 insurance year, no additional transfers were made to reserve funds for closed insurance years to cover possible unasserted asbestos claims. PLI paid in full the premiums due and assessments levied for all

years in which policies were issued by American Club except for the years 1979, 1983, 1984 and 1985. It is undisputed that asbestotic diseases constitute injuries compensable under the policies.

The Maritime Asbestosis Legal Clinic ("MALC") represents over 5,000 claimants ("Asbestosis Claimants") seeking damages for their alleged exposure to asbestos with resulting injury while serving on PLI ships during one or more of the years in which American Club had issued P & I policies to PLI. With few exceptions, each claimant also served on vessels of other shipowners during their period of exposure to asbestos.

The Second Amended Joint Plan of Reorganization as Modified (the "Plan") was confirmed by the bankruptcy court on October 4, 1990. The Plan, whose confirmation was never appealed by any party, established a PLI Disbursement Trust (the "Trust") to liquidate asbestos-related claims and to enforce the Trust's interests under PLI's numerous insurance policies. Pursuant to its authority under the Plan, on December 14, 1990, the PLI Disbursement Trustee ("Trustee") commenced an adversary proceeding in the bankruptcy court against American Club seeking a declaratory judgment to determine the Trustee's rights under the P & I policies issued by American Club to PLI. The Asbestosis Claimants, represented by MALC, were granted leave by the bankruptcy court to intervene in that proceeding on February 26, 1991. On April 2, 1991, Judge Conrad signed an order declaring the adversary proceeding to be a "core" proceeding, or in the

alternative a "related" proceeding, and denying American Club's motion that he abstain from hearing the matter.

In its "Memorandum of Decision on Summary Judgment and 11 U.S.C. § 553," issued December 10, 1992, the bankruptcy court ruled on the parties' cross-motions for summary judgment in the declaratory judgment action. The bankruptcy court entered a "Final Order and Judgment" on January 10, 1993 implementing the conclusions it had reached in the summary judgment opinion. American Club filed a notice of appeal on March 11, 1993, seeking review of the April 2, 1991 order of Judge Conrad declaring the proceeding to be "core" and refusing to abstain; the December 10, 1992 summary judgment decision; and the January 10, 1993 Final Order and Judgment (the "First Appeal").

In March of 1993, the PLI Disbursement Trustee and MALC entered into a stipulation settling the asbestos is claims by specifying certain fixed amounts to be paid for certain named categories of diseases, and establishing a procedure for the Trustee's payment of the claims. The bankruptcy court "so ordered" the stipulation of settlement on March 9, 1993. American Club did not receive notice of this stipulation until it received the Trustee's initial claim under it, in a letter dated May 25, 1993, seeking reimbursement of over $13,000,000 expended pursuant to the so ordered stipulation. American Club subsequently declined to pay the claims for indemnification asserted by the Trustee. As a result, in an order dated August 4, 1993 and filed on August 9, 1993 ("August 4 Order") upon MALC's

motion, the bankruptcy court directed American Club to fully comply with the Bankruptcy Plan and to reimburse the Trustee for sums expended pursuant to the stipulation.

American Club sought leave from this Court to appeal the August 4 Order, arguing that the bankruptcy court lacked jurisdiction to issue the order because it impacted on issues under appeal in this Court. This Court granted American Club's motion for leave to appeal that order in a Memorandum Opinion and Order dated September 27, 1993.

In a hearing held September 2, 1993, on American Club's motion, the bankruptcy court ordered the Trustee to submit to American Club information sufficient to enable American Club to determine the reasonableness of the settlements. On September 21, 1993, before the Trustee had complied with this order, and over American Club's objections, the bankruptcy court entered the First Partial Judgment submitted by MALC requiring payment of $66,160,000 by American Club to the Trustee pursuant to the so ordered stipulation of settlement.

American Club has also appealed this judgment. That appeal, consolidated with the first, seeks review of both the August 4 Order and the First Partial Judgment.

DISCUSSION

I. *"Core" Proceeding*

In *Northern Pipeline v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982), the Supreme Court held unconsti-

tutional the broad congressional grant of jurisdiction to bankruptcy courts to decide "private rights" matters, such as state breach of contract claims. *Marathon* involved the adjudication in bankruptcy court of a state breach of contract claim based on a pre-petition contract brought by a debtor against a defendant who had not filed a claim with the bankruptcy court. As explicated in a later decision, *Marathon* held "that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985).

In response to the Supreme Court's decision in *Marathon,* Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. § 151, restructuring the jurisdiction of the bankruptcy courts by drawing a distinction between "core" and "non-core" proceedings. Bankruptcy courts now have jurisdiction to adjudicate matters constituting core proceedings pursuant to 28 U.S.C. § 157(b)(1). Although the statute does not define "core," § 157(b)(2) sets forth a non-exclusive list of matters considered to be core. Bankruptcy courts may also hear matters which are not core but are otherwise related to the bankruptcy case. *See* 28 U.S.C. § 157(c)(1). These non-core but "related" matters are also left undefined.

Because the bankruptcy court has jurisdiction to adjudicate both categories of proceedings, the

primary consequence of a determination of whether the proceeding is core or non-core in this case is the applicable standard of review on appeal of the bankruptcy court's decision.

When adjudicating core matters, the bankruptcy court may issue final orders and judgments, which are subject to appellate review pursuant to Bankruptcy Rule 8013. Under that rule, a district court reviews the bankruptcy court's findings of facts under a "clearly erroneous" standard and his conclusions of law *de novo*. *See Brunner v. New York State Higher Educ. Services,* 831 F.2d 395, 396 (2d Cir. 1987); *In re Baker,* 140 Bankr. 88, 89 (D.Vt. 1992); *IAM v. Eastern Air Lines, Inc.,* 121 Bankr. 428, 432 n.5 (S.D.N.Y. 1990); *In re Int'l Distribution Centers, Inc.,* 103 Bankr. 420, 421 (S.D.N.Y. 1989); *In re Tavern Motor Inn, Inc.,* 80 Bankr. 659, 660 (D.Vt. 1987).

In proceedings involving non-core but related matters, the bankruptcy court is not empowered to make any final determinations. § 157(c)(1). Rather, it must submit proposed findings of fact and conclusions of law to the district court. In non-core related proceedings, the district court reviews *de novo* both the factual findings and the legal conclusions of the bankruptcy court. *See* § 157(c)(1); *see also* Bankruptcy Rule 9033(d) (governing review of proposed findings of fact and conclusions of law in non-core proceedings); *IAM v. Eastern Air Lines,* 121 Bankr. at 432 n.5.

Because the standard of review of the bankruptcy court's conclusions of law is *de novo* regardless of the category in which the proceeding falls, the determination whether the pro-

ceedings at issue are core or non-core related, has significance only as to the standard of review accorded the bankruptcy court's findings of fact. As noted, if the proceeding is core, findings of fact will not be disturbed unless clearly erroneous, whereas in a non-core related proceeding, the district court reviews factual findings *de novo*.

At a hearing held March 20, 1991, Judge Conrad held that although the matter involved a mixture of core and non-core matters, the core matters predominated, making it "essentially a core proceeding." Record in First Appeal ("R1") at 353. American Club argues that Judge Conrad erred in deciding that the adversary proceeding was a core proceeding. American Club further argues that the proceedings which led to the August 4 Order and the First Partial Judgment against American Club involved the same issues as the adversary proceeding and were therefore non-core proceedings for the same reasons. American Club maintains that because the proceedings were non-core, the bankruptcy court should have abstained from adjudicating the matters. In the alternative, American Club argues that the matters were at most non-core "related" proceedings subject entirely to *de novo* review by this Court.

American Club does not appear to argue that the proceedings at issue require application of the mandatory abstention provisions of 28 U.S.C. § 1334(c)(2). Indeed, decisions made under that section are, by the statute's own terms, not subject to appellate review. *See In re Ben Cooper, Inc.*, 924 F.2d 36, 38 (2d Cir.), *cert. denied*, 500

U.S. 928, 111 S. Ct. 2041, 114 L. Ed. 2d 126 (1991). Rather, American Club contends that the bankruptcy court erred in exercising its discretion not to abstain from hearing the matter pursuant to 28 U.S.C. § 1334(c)(1), which permits a bankruptcy court "to abstain[ ] from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." The bankruptcy court's exercise of discretion pursuant to that subsection is subject to appellate review under an abuse of discretion standard. *In re Pan American Corp.*, 950 F.2d 839, 844 (2d Cir. 1991).

Having reviewed his decision and the applicable law, I conclude that the adversary proceeding seeking declaratory relief was core and that Judge Conrad did not abuse his discretion in declining to abstain from hearing it.

A number of factors influence my decision that the proceeding was core, not the least of which is the Second Circuit's decision in *In re St. Clare's Hospital,* 934 F.2d 15, 18 (2d Cir. 1991), which I believe is directly applicable to the present case. In that case, the court of appeals upheld, *inter alia,* the bankruptcy court's determination that an adversary proceeding, in which the debtor hospital sought a judgment declaring that its insurer was obligated to defend and indemnify St. Clare's in a medical malpractice action against it, was a core proceeding. The case at bar also involves a declaratory judgment proceeding initiated by the trustee in bankruptcy to resolve issues concerning coverage and indemnification under insurance policies. American Club emphasizes the need for application of predominately

state law in urging that the proceeding should have been considered non-core. But, that factor is not determinative. Section 157(b)(3) admonishes that, "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." Moreover, in *In re St. Clare's Hospital,* the proceeding which was held to be core required the bankruptcy court to apply only state law in interpreting the policy provisions.

My conclusion is also influenced by the recognition that the insurance contracts at issue are considered property of the debtor's estate. *See id.* at 18-19; *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92 (2d Cir. 1988); *Tringali v. Hathaway Machinery Co.*, 796 F.2d 553, 560 (1st Cir. 1986); *A.H. Robins Co., Inc. v. Piccinin,* 788 F.2d 994, 1001 (4th Cir.), *cert. denied,* 479 U.S. 876, 93 L. Ed. 2d 177, 107 S. Ct. 251 (1986). Indeed, a "liability policy of the debtor . . . is a valuable property of a debtor, particularly if the debtor is confronted with substantial liability claims within the coverage of the policy in which case the policy may well be . . . 'the most important asset of [i.e. the debtor's] estate.'" *A.H. Robins Co.*, 788 F.2d at 1001 (quoting *In re Johns Manville Corp.*, 40 Bankr. 219, 229 (S.D.N.Y. 1984)) (alteration in *Robins).* The fact that over seven thousand claims potentially covered under those policies have been filed against the PLI estate makes determination of coverage under those policies, and the operation of specific provisions of those policies such as the "pay first" and deductible provisions, essential and inextricably tied to the administration of the estate.

The Trustee's having brought the declaratory judgment action, in order to enforce the Trust's interests under the insurance policies, also distinguishes this case from *In re Titan Energy, Inc.*, 837 F.2d 325 (8th Cir. 1988), and other cases cited by American Club in which the insurance-related proceeding found to be non-core was initiated either by the insurer against the debtor or between two third-parties to the bankruptcy.

None of the cases cited by American Club in support of its position compels a contrary result. Because this is not a traditional breach of contract action, some of the cited cases *(see e.g. Marathon,* 548 U.S. 50; *In re: Orion Pictures Corp.*, 4 F.3d 1095, 1102 (2d Cir. 1993)) bear scant resemblance to the facts of this case.[1]

Similarly, the several cases cited by American Club which held adversary proceedings involving insurance contracts to be non-core are inapposite. In both *In re R.I. Lithograph Corp.*, 60 Bankr. 199 (Bankr. D.R.I. 1986), and *In the Matter of Pied Piper Casuals, Inc.*, 65 Bankr. 780 (S.D.N.Y. 1986), the adversary proceedings held to be non-core involved claims brought by the debtor against the debtor's insurance company for reimbursement of the debtor's *own* losses assertedly covered by the insurance policies. In *R.I. Lithograph,* the debtor filed suit against its insurer

[1] In *Orion Pictures,* the court held, *inter alia,* that an adversary proceeding in which the debtor alleged the anticipatory breach of a pre-petition contract and sought declaratory relief setting forth the parties' rights and obligations, as well as specific performance and damages, was a non-core proceeding.

in state court, subsequently removed to the bankruptcy court after its bankruptcy petition was filed, seeking compensatory and punitive damages for the insurer's failure to pay for property damage and business interruption resulting from vandalism allegedly covered by the policy. In *Pied Piper,* the debtor's trustee sought to recover against an insurance company in bankruptcy court for alleged theft loss damages it suffered which were assertedly covered under the policy. Our case presents an entirely different situation. Here, the Trustee does not seek damages for losses from property damage or theft which it alleges are covered by the insurance. It has instead, pursuant to the Plan's mandate, brought an action to declare coverage in response to tort claims made against the estate. The insurance coverage issue and the manner in which the "pay first" provision in the P & I policies can be satisfied directly affect the administration of Trust assets and the settling of over 7,000 claims against the estate.

American Club's reliance on *In re Guenther,* 65 Bankr. 650 (Bankr. D.Colo. 1986), is misplaced. In *Guenther,* the debtor brought an action against its insurer seeking actual and punitive damages alleging that the insurer failed to settle personal injury claims, the resulting judgments having forced the debtor into bankruptcy. Although the insurer had defended the claim in state court and paid the portion of the judgment representing the policy limit, the debtor alleged that the insurer's failure to settle the claim for a much lower amount constituted a bad faith breach of contract, a breach of fiduciary duty,

and negligence. The bankruptcy court held that the proceeding was a non-core related proceeding and abstained from hearing it. This case, by contrast, is not a breach of contract claim. Instead, it is an action to declare PLI's rights under the insurance contracts issued by American Club, which, in turn, will determine the administration of over 7,000 claims by asbestosis claimants made upon the estate.

As to the proceedings leading to the entry of the August 4 Order and the First Partial Judgment, American Club argues they are non-core because they involve the same issues as the prior declaratory judgment proceeding and because they required Judge Conrad to determine the values of the asbestosis claims. I disagree. The bankruptcy court did not undertake to revisit in those proceedings the issues of coverage which had already been determined. The proceedings' purpose was to compel American Club to comply with the Plan, with the court's previous decision approving the *Liman* arrangement,[2] and with the so ordered stipulation of settlement. Therefore, the proceedings did not involve the same issues as the declaratory judgment proceeding. But because they involved enforcement of the so ordered stipulation of settlement, the Plan, and the prior summary judgment decision of the bankruptcy court, the proceedings are core. *See*

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[2] *See Liman v. American Steamship Owners Mutual Protection and Indemnity Associations*, 299 F. Supp. 106 (S.D.N.Y.), *aff'd* 417 F.2d 627 (2d Cir. 1969) (per curiam), *cert. denied*, 397 U.S. 936, 25 L. Ed. 2d 116, 90 S. Ct. 946 (1970).

In re Men's Sportswear, Inc., 834 F.2d 1134, 1137 (2d Cir. 1987) (proceeding in which debtor sought to enforce rights granted by prior bankruptcy court decision would be considered core) (dictum); *In re L & S Industries, Inc.*, 122 Bankr. 987, 992 (Bankr. N.D.Ill.) (action to enforce previous order of court constituted a "matter concerning the administration of the estate" under 28 U.S.C. § 157(b)(2)(A) and was therefore a "core" proceeding), *aff'd* 133 Bankr. 119 (N.D.Ill. 1991), *aff'd* 989 F.2d 929 (7th Cir. 1993).

As to its contention that the proceedings required Judge Conrad to determine the value of tort claims, American Club's argument lacks merit. Judge Conrad did not "determine" the value of any of the claims in his August 4 Order or in signing the First Partial Judgment. MALC and the Trustee had previously settled those claims and had gone through the *Liman* process of satisfying the "pay first" obligation in the P & I policies.[3] In the August 4 Order, Judge Conrad held that American Club was obligated to reimburse the Trustee for sums expended pursuant to the settlement and in the manner approved by the court in the summary judgment decision. The First Partial Judgment simply requires American Club to indemnify the Trustee for sums expended pursuant to the "so ordered" March 9, 1993 stipulation settling claims. Neither of these proceedings therefore involved the bankruptcy court's consideration of the value of the claims themselves. In making his decisions, Judge Con-

[3] The operation of the *Liman* process in the case at bar is discussed at pp. 38-45, *infra*.

rad was concerned solely with ensuring that American Club indemnify the Trustee consistent with the extent of coverage and the manner of satisfying the "pay first" obligation previously determined by the court.

As to the abstention issue, I conclude that Judge Conrad properly exercised his discretion not to abstain. Because I have concluded that the proceedings are core, it was clearly proper for the bankruptcy court to adjudicate them. But, even if the proceedings were non-core but related, I conclude that the bankruptcy court's decision not to abstain was proper. In both *A.H. Robins* and *Tringali* the courts determined that the automatic stay provision applied to proceedings involving insurance policy coverage. In *MacArthur* the court held, *inter alia*, that the bankruptcy court had properly exercised jurisdiction over proceedings approving settlements between the debtor and various of its insurance carriers and enjoining all suits against the insurers related to the settled policies. *See* 837 F.2d at 93. In *Robins*, the court held that the debtor was entitled to a preliminary injunction restraining prosecution of products liability actions in state court because the actions might "diminish" the pool of available insurance funds, an important asset of the estate. *See* 788 F.2d at 1008. Although neither of these cases is directly on point, they each demonstrate that because of the significance insurance coverage issues often have in a bankruptcy proceeding, it is proper under certain circumstances for a bankruptcy court to adjudicate such matters.

As stated, the declaratory judgment proceeding at issue in the present case involved determination of the scope of coverage under the insurance policies, the operation of particular policy provisions and the proper method of payment of claims by the Trustee. Considering that thousands of claims have been filed against the estate, coverage of these claims under the policies is clearly a crucial issue in the administration of the estate. As such, and in view of the fact that such policies are undeniably property of the estate, I conclude Judge Conrad did not abuse his discretion in deciding to hear the proceeding.

The holding in *In re Titan Energy, Inc.*, 837 F.2d 325 (8th Cir. 1988), cited by American Club, does not alter my conclusion. In that case, a claimant under the debtor's products liability policies filed suit directly against the insurer in state court seeking collection of the policy proceeds. The insurer subsequently brought an action in the bankruptcy court to determine the policies' coverage of that claim. The Eighth Circuit held that the proceeding was a non-core related proceeding, and that the bankruptcy court properly abstained from hearing it.

Several factors distance *Titan* from the case at bar. First, the declaratory judgment action in *Titan* was initiated by the insurer and the trustee expressed no interest in litigating the insurance coverage questions in bankruptcy court. The court of appeals considered that these circumstances weighed in favor of abstention. *Id.* at 332. In this case, by contrast, the declaratory judgment action was an action in which, by commencing the proceeding himself, the Trustee

unequivocally demonstrated not only a strong interest in the coverage issues but a preference for having the issues adjudicated in bankruptcy court.

Furthermore, the *Titan* court noted that the resolution of the claims would have had only a "peripheral" impact on the estate, given that the issue involved coverage of a single claim in the amount of $6,000,000. *Id.* Here, over five thousand Asbestosis Claimants have filed over 7,000 claims against the estate totalling many millions of dollars. Thus, with both vastly greater monetary stakes and number of claimants, the impact of the proceedings on the reorganization in this case is stronger.

Finally, the fact that the debtor was in Chapter 7 rather than Chapter 11 bankruptcy influenced the *Titan* court's decision that abstention was proper. As the court reasoned, "the desire to aid a debtor's reorganization effort provides another strong impetus for courts to exert jurisdiction over a debtor's insurance policies." *Id.* at 331 (footnote omitted). In this case, because PLI is proceeding in Chapter 11 bankruptcy, the bankruptcy court has a reorganization plan to protect; a factor which makes it more appropriate for the bankruptcy court to have retained jurisdiction over the proceeding than it would have been in Titan.

II. *Coverage Allocation*

The issues in this appeal concerning coverage under the P & I policies are complicated by the highly complicated etiology of asbestosis, the disease for which MALC's clients seek recovery

against PLI. Asbestosis results from inhalation of asbestos particles over time. It is progressive and cumulative; continuous exposure to and inhalation of asbestos both increases the likelihood of contracting the disease and hastens its arrival. *See J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502, 505 (S. Ct.Pa. 1993). Because it can take many years after exposure before the symptoms of asbestosis are manifested, it is extremely difficult to pinpoint the moment at which the injury occurred for purposes of triggering coverage under an insurance policy. But given that tissue damage occurs at the moment of, or shortly after, inhalation of asbestos particles, many courts have found that "injury" occurs at initial exposure to asbestos. *See e.g., Ins. Co. North America v. Forty-Eight Insulations,* 633 F.2d 1212, 1223 (6th Cir. 1980), *modified and aff'd on rehearing,* 657 F.2d 814 (6th Cir.), *cert. denied,* 454 U.S. 1109, 70 L. Ed. 2d 650, 102 S. Ct. 686 (1981), *reh'g denied,* 455 U.S. 1009, 71 L. Ed. 2d 878, 102 S. Ct. 1648 (1982).

In its summary judgment opinion and subsequent Order and Judgment, the bankruptcy court held that coverage under a P & I policy was "triggered" when a merchant mariner was exposed to asbestos, with accompanying injury-in-fact, while serving on a PLI ship during the period of time covered by the policy.[4] In so doing, the court rejected the "exposure-in-residence" theory urged

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[4] The parties agree, and the bankruptcy court so held, that New York law applies in interpreting the insurance policies.

by MALC. That is to say, the court rejected the theory that as a result of the progressive development of the disease all successive policies following a mariner's exposure are triggered, whether or not the mariner continued to serve on PLI vessels during the periods of those subsequent policies. Under the court's ruling, policies are triggered only if the mariner served on asbestos-infected PLI ships during the period covering that policy. This ruling has not been challenged on appeal.

The bankruptcy court noted that multiple P & I policies (both PLI and non-PLI) may be triggered for some claimants if they worked on more than one asbestos-infected ship in a given insurance year. When coverage under more than one P & I policy is triggered, the issue becomes whether American Club is wholly liable for all of a claimant's injuries resulting from exposure to asbestos on its triggered policy, or whether, as it contends, American Club's liability should be apportioned according to the length of exposure to asbestos of each affected mariner on a PLI vessel relative to his exposure on other vessels during each policy year.

The parties do not cite, and my research has not disclosed, a case squarely addressing the issue of whether an insurer's indemnification of its insured should be reduced in proportion to the injured claimant's exposure to the injury-causing hazardous substance by entities other than the insured. After considering the bankruptcy court's decision and the applicable general law, I reject American Club's allocation argument.

The circumstances presented by this case differ from those in the typical case dealing with apportionment of insurance coverage. Apportionment generally contemplates division of responsibility for payment or indemnification between multiple policies covering the same risk of the same insured over the same or different time periods, whether provided by one or more insurers. *See* 71 N.Y.Jur.2d *Insurance* § 1892 at p. 331 (1989) ("The test to be applied in determining the respective liabilities of concurrent insurers is . . . whether the policies insure the same property, the same interest and against the same risk."). In this case, by contrast, the dispute is not over who among numerous of its insurers will indemnify PLI for the sums it must pay to the injured third parties. Rather, PLI's sole insurer for the periods in question seeks to have its liability for indemnifying PLI reduced because the injured third-parties were also exposed to asbestos on ships of other lines over the periods during which the Club's policies were in force. Essentially, then, American Club's request is not for traditional allocation, but to have its own scope of coverage narrowly construed.

As to such a claim, the cases cited by MALC in support of pro rata allocation are inapposite. *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988), involved the issue of allocation between two consecutive triggered policies possessed by Uniroyal covering injuries to third parties resulting from exposure to Agent Orange it manufactured and delivered to the government. Both policies at issue were provided by the same insurer to the same insured. The court

determined that because the "trigger" for liability was delivery of the hazardous substance to the government, each policy would be responsible to cover the settlement payments in proportion to the number of deliveries made during each policy term. The court's conclusion was based in substantial part on the "other insurance" clause in each policy. Pursuant to each "other insurance" clause, each policy was to be considered "excess" insurance if any other insurance covered the same loss. Thus, because under New York law, when two excess insurance policies cover the same loss, pro rata allocation among the policies is required, the court concluded that pro rata allocation was appropriate. *Id.* at 1393.

Forty-Eight Insulations, supra, involved circumstances similar to those in *Uniroyal,* except that the triggered consecutive insurance policies were issued to the asbestos manufacturer by different insurers. The court held that allocation among all the insurers based on the length of each insurers' respective coverage was appropriate under the exposure theory of coverage trigger because the cumulative and indivisible nature of the injury renders determination of the precise proportion of the injury occurring during any particular policy period impossible. Because both of these cases addressed the issue of apportionment between policies issued to the same insured, they have limited applicability to the circumstances of this case and are certainly not determinative.

Accordingly, to determine this issue of coverage, I must begin with an analysis of the P & I policy terms to ascertain whether anything in the

policy requires or permits such a reduction in American Club's liability. Under New York law, an insurance policy is a contract "which, like any other contract, must be construed to effectuate the parties' intent as expressed by their words and purposes." *American Home Prod. v. Liberty Mut. Ins. Co.*, 565 F. Supp 1485, 1492 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). "If the words of the contract are unambiguous, establishing only one meaning when read in the context of the entire policy, then a [court] must enforce the plain meaning of the words . . . ." *Id.* However, if a provision is ambiguous, when construing it, "the court must remain as faithful as possible to the clear intent of the parties." *Uniroyal*, 707 F. Supp. at 1377. In this exercise, ambiguous terms should be viewed from the vantage point of the "reasonable expectations and purposes of the ordinary businessman." *Avondale Indus., Inc. v. Travelers Indem. Co.*, 607 F. Supp. 1314, 1319 (S.D.N.Y. 1988), *aff'd*, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 496 U.S. 906, 110 L. Ed. 2d 269, 110 S. Ct. 2588 (1990); *see Fried v. North River Ins. Co.*, 710 F.2d 1022, 1025 (4th Cir. 1983) (applying New York law); *see Atl. Cement v. Fidelity & Cas. Co. of N.Y.*, 91 A.D.2d 412, 459 N.Y.S.2d 425, 429 (A.D. 1st Dep't 1983), *aff'd* 63 N.Y.2d 798, 481 N.Y.S.2d 329, 471 N.E.2d 142 (1984). If the intent of the parties is evident after viewing the contract in its entirety, the court may not rewrite the terms of the policy in an effort to extend coverage out of a desire for an equitable outcome. *Fried v. North River*, 710 F.2d at 1025-26. If the policy terms are ambiguous, the parties should

be afforded the opportunity to offer extrinsic evidence as to their intent. *Id.* at 1374. If the extrinsic evidence does not resolve the ambiguity, then the court applies the state law presumption of *contra proferentem,* construing the policy against the insurer.[5] *See Westchester Resco. v. New Eng. Reinsurance Group,* 818 F.2d 2, 3 (2d Cir. 1987) (per curiam); *Uniroyal,* 707 F. Supp. at 1373; *Schering Corp. v. Home Insurance Co.,* 712 F.2d 4, 10 (2d Cir. 1983).

Under the P & I policies issued to PLI, American Club agreed to:

> Indemnify the assured against any loss, damage or expense which the assured shall become liable to pay and shall pay by reason of the fact that the assured is the owner, or operator, manager, charterer, . . . of the insured vessel . . . and which shall result from the following liabilities, risks, events, occurrences and expenditures:
>
> (1) Liability for . . . personal injury . . . or illness . . . .

R1 at 230.[6]

Considering the "plain meaning" of policy language, the bankruptcy court concluded that "any

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[5] It can be argued, as American Club does here, that the rule of *contra proferentem* should not be applied when the insurer is a sophisticated business such as PLI. However, American Club offers, and the Court finds, no case which stands for such an exception to the *contra proferentem* rule.

[6] All policies contained substantially identical language insofar as the relevant clauses are concerned.

loss" requires American Club to indemnify PLI under each triggered P & I policy for the entire injury flowing from a mariner's exposure to asbestos on a PLI ship during any of the triggered policy periods. Allocation among policies of other insurers would be appropriate, Judge Conrad reasoned, only "if evidence presented at trial can specifically identify and quantify the actual injury sustained during a given policy period relative to other triggered policies." R1 at 675. Judge Conrad expressed doubt, however, as to the possibility that such evidence could be presented.[7] *Id.*

Together with the bankruptcy court, I find nothing in the insurance contract terms providing specifically for the reduction in liability American Club urges. The policies contain no limitation on the phrase "any loss" which would operate to make American Club liable for anything less than the entire loss that PLI becomes liable to pay and does pay, up to stated policy limits. An identical conclusion was reached by the D.C. Circuit in *Keene Corp.*, 667 F.2d at 1050.

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[7] Judge Conrad erroneously concluded that "*Asbestosis Claimants* may select among the triggered policies according to standard joint and several liability practice." R1 at 698, 702 (emphasis added). Since PLI is the Assured, it is PLI's right, not that of the injured third parties, to choose the triggered policy or policies under which it seeks indemnification. *See, e.g., Keene Corp. v. Ins. Co. of North America*, 215 U.S. App. D.C. 156, 667 F.2d 1034, 1049-1050 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007, 71 L. Ed. 2d 875, 102 S. Ct. 1644, 102 S. Ct. 1645, *reh'g denied*, 456 U.S. 951, 72 L. Ed. 2d 476, 102 S. Ct. 2023, 102 S. Ct. 2024 (1982).

In *Keene*, several different insurers provided consecutive policies to Keene, an asbestos manufacturer, effective for different periods during the course of workers' exposure to the asbestos. The court held that each of the insurers was liable for indemnifying the manufacturer for the full amount of liability to an injured claimant up to the stated limit of a triggered policy.

Although *Keene*, like *Uniroyal* and *Forty-Eight Insulations*, is not entirely germane because it involved the division of responsibility among insurers of the same insured, its reasoning in construing the indemnification provision of the policies is helpful to my analysis. The relevant indemnification language provided in pertinent part that:

> the company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . .

Id. at 1039 (emphases deleted). The court concluded that "there is *nothing* in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period." *Id.* at 1048 (emphasis in original). The court reasoned that:

> For an insurer to be only partially liable for an injury that occurred, in part, during its policy period would *deprive* Keene of insurance coverage for which it paid. With each policy, Keene paid for insurance against all liability for bodily injury. The policies do not distinguish between injury that is caused by occurrences that continue to transpire

> over a long period of time and more common types of injury. Nor do the policies provide that 'injury' must occur *entirely* during the policy period for full indemnity to be provided.

Id. at 1049 (emphasis in original); *accord ACandS, Inc. v. Aetna Cas. and Sur. Co.*, 764 F.2d 968, 974 (3d Cir. 1985) (under terms of policy requiring insurer to indemnify insured for "all sums" it became liable to pay, each insurer was fully liable to pay all damages resulting from asbestos-related injury once policy was triggered; it was irrelevant that the injury was caused in part during another policy period); *J.H. France Refractories*, 626 A.2d at 507-508 (following *Keene*, court held that "under any given policy, the insurer contracted to pay all sums which the insured becomes legally obligated to pay, not merely some pro rata portion thereof").

There is no material difference between the indemnification provision in the *Keene* policy and the one here. The term "any loss" in the P & I policies is analogous to the "all sums" language in the *Keene* policies. Both phrases unambiguously contemplate liability for the whole amount of damages. Moreover, there is no other language in the policy to suggest that PLI expected anything less than complete security for the risk of liability for latent injury of which it could not have been aware when it purchased the policies. That this is true is evident particularly when considering that under the Jones Act, 46 U.S.C. § 688, one of the statutes on which Asbestosis Claimants base their claims, PLI as a tortfeasor can be held jointly and severally liable for the

entirety of the damages a seaman sustains, even if PLI's negligence was minimal. *See, e.g., Edmonds v. Compagnie Generale Trans Atlantique,* 443 U.S. 256, 271, 61 L. Ed. 2d 521, 99 S. Ct. 2753, *reh'g denied,* 444 U.S. 889, 62 L. Ed. 2d 126, 100 S. Ct. 194 (1979).

Accordingly, I conclude that under the clear and unambiguous terms of the insurance contracts, American Club is obligated to indemnify PLI for the full amount of damages resulting from a mariner's exposure to and inhalation of asbestos on a PLI vessel during the period of a triggered policy, which PLI becomes liable to pay and does pay, up to the stated policy limits.[8]

The bankruptcy court rejected American Club's argument, renewed here, that the "Other Insurance" clause contained in the policies supports allocation. That clause provides:

> [American Club] shall not be liable for any loss, damage or expense against which, but for the insurance herein provided, the Assured is or would be insured under existing insurance.

R1 at 338.

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[8] It follows from this holding that allocation will not be permitted even if evidence conclusively quantifies the portion of the injury resulting from exposure on PLI ships, a result which is in any event extremely doubtful. The only reason for which American Club will be absolved of its responsibility to indemnify PLI is if a mariner was never exposed to asbestos on PLI ships during covered periods. Therefore, that portion of Judge Conrad's decision permitting allocation if evidence can establish the actual portion of a mariner's injury sustained from exposure on PLI vessels during a particular policy period, is reversed.

The court interpreted this clause "to refer to concurrent policies that PLI may have carried that also covered losses occurring during the term of a triggered P & I policy" and concluded that, "the clause is therefore inapplicable to other P & I policies issued to insure the same or other vessels during different insurance periods." R1 at 675.

I conclude that Judge Conrad's interpretation of the "other insurance" clause comports with the plain meaning of the provision's language. The clause refers specifically to other insurance of the "Assured". The "Assured" is defined as PLI or its vessels. R1 at 242. Thus, by its clear and unambiguous language, the provision applies to limit American Club's liability for loss covered by other insurance of *PLI*. Yet, the Club does not contend that PLI or its vessels had other concurrent insurance which covers the claims asserted against it. Rather, American Club's contention is that because insurance of non-PLI vessels potentially covers the damage sustained by a seaman, the "other insurance" clause thereby limits American Club's liability for indemnifying PLI for the losses it sustains. Essentially, American Club seeks to expand the definition of "Assured" to include entities other than PLI. This interpretation is simply contrary to the plain meaning of the provision's terms. Nothing in the provision purports to limit American Club's indemnification liability because an injured third party could have pursued its claim against another shipowner covered by other insurance.

The interpretation urged by American Club not only contradicts the plain language of the provision, it infuses the term "other insurance" with a meaning completely at odds with its general understanding in the insurance industry. "The term 'other insurance,' in the special sense in which it is used in insurance contracts, describes the situation in which two or more policies of insurance cover the same risk in the name of, or for the benefit of, the same person." Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes,* § 11.01, at 431 (6th ed. 1993) (citing cases). "Other insurance" clauses therefore define one insurer's liability vis-a-vis "co-insurers" of the same insured through either concurrent or consecutive policies covering the same risk. *See id.; see also Institute for Shipboard Educ. v. Cigna Worldwide Ins. Co.*, 22 F.3d 414, 419-20 (2d Cir. 1994) (describing the three general types of "other insurance" clauses and their operation). The operation of the clause suggested by American Club deviates substantially from the generally understood significance of "other insurance" clauses and the bankruptcy court correctly rejected it.

III. *Application of Deductibles*

The P & I policies at issue contain a provision for the application of deductibles for personal injury liability indemnification as follows:

> (1) . . . .
>
> (e) Claims hereunder, other than for burial expenses, are subject to a deduction of $ with respect to each accident or occurrence.

R1 at 231. The policies do not define the terms "claims," "accident," or "occurrence."

The contested issue on appeal is whether American Club is entitled to take one deductible per injured seaman per triggered policy (regardless of the number of PLI vessels on which a particular seaman served during the policy year), as American Club contends, or may take only one deductible per *policy* triggered regardless of the number of injured mariners the policy covers, as MALC argues. The deductibles range from $500 to $1,000 for the policies issued during the 1940's and 1950's, and from $2,500 to $100,000 for policies issued during the 1960's, 1970's and 1980's. Under American Club's position, if the deductible amount is equivalent to or greater than any individual mariner's claim, American Club could avoid indemnification entirely.

In its summary judgment opinion, the bankruptcy court focused on the terms "claims" and "occurrence" in the deductible provision and found both to be unambiguous. Judge Conrad held that " 'claims hereunder' merely mean[s] that the deductible applies to claims filed under that particular P & I policy", R1 at 679, and that because "occurrence" should be defined not by reference to the individual injuries but by the underlying event giving rise to the injuries, the provision requires a deductible to be taken for each underlying event, rather than each claim. R1 at 681. American Club argues that Judge Conrad improperly failed to take into consideration extrinsic evidence of the parties' practice in applying the deductibles. Judge Conrad held that because the deductible clause was unambiguous,

he could not look to external circumstances to interpret the provision. R1 at 679.

Judge Conrad correctly concluded that the phrase "claims hereunder" in the context of the deductible provision is unambiguous. A contract provision is ambiguous under New York law if it is reasonably susceptible of more than one meaning, when viewed objectively by a reasonably intelligent person who has examined it in the context of the entire agreement and who is familiar with the customs, terminology, practices and usages in the particular trade or business. *See Curry Road Ltd. v. K Mart Corp.*, 893 F.2d 509, 511 (2d Cir. 1990); *see also U.S. Fire Ins. Co. v. General Reinsurance Corp.*, 949 F.2d 569, 572 (2d Cir. 1991). In MALC's view, the phrase operates as a signal indicating that the stated deductible amount applies to claims arising under that particular policy provision, as distinguished from other deductible amounts for claims arising under other provisions of the policy. "Claims" therefore stands independent from the deductible amount, merely introducing the provision which connects the deductible to "each accident or occurrence." In this view, the deduction applies not to each claim but "with respect to each accident or occurrence."

Conversely, American Club argues that the phrase "claims hereunder" is the touchstone for deductible application. In its view, the word "claims" is directly connected to the deductible, such that the deduction applies to each claim filed against PLI by an injured seaman.

American Club's interpretation requires a strained reading of the provision's language.

Unlike American Club, I do not find it effortless to conclude that "claims" is directly linked to the deductible application. To begin with, the provision does not specifically state that it applies to "each" claim. "Claims" could signify "all" claims, or the aggregate of claims, just as readily as "each" claim. Yet, it is the latter interpretation that American Club urges is the only reasonable one. If we assume, however, that the parties intended the phrase "claims hereunder" to mean that the deductible applies to each claim filed against PLI, the last phrase of the provision, "with respect to each occurrence or accident," is rendered either superfluous or inconsistent. On the one hand, if the parties intended the deductible to apply to each *claim*, how could it at the same time apply to each "occurrence", a requirement in the provision that cannot be overlooked? On the other hand, if each "claim" constitutes an "occurrence" such that the two terms are synonymous, what is the necessity for the last phrase of the provision? If the deductible so clearly applies to each "claim", why would not the provision simply end after stating the deductible amount? American Club's interpretation leaves these serious questions unanswered; whereas, the bankruptcy court's view results from a natural reading of the phrase.

For these reasons, I conclude that the only reasonable reading of the phrase "claims hereunder" in the context of the provision is that it is not the axis on which the deductible application turns. Rather, as Judge Conrad determined, it serves as an introductory phrase not directly linked to the application of deductibles. Since the phrase is not

reasonably susceptible of more than one interpretation, it is not ambiguous and its clear meaning must be enforced. I conclude therefore that under its clear meaning, the provision requires the deductible to be applied to each "occurrence".[9] Having so concluded, I must now consider the meaning of that term.

As a preliminary matter, I do not agree with Judge Conrad's conclusion that the term "occurrence" is unambiguous. "Occurrence" is not defined in the policy. In the *Scribner-Bantam English Dictionary* (1979), "occurrence" is defined as "(1) act or fact of occurring; (2) happening; event; (3) appearance or presence of some phenomenon at a particular time or place." In the broadest sense of its commonly understood definition, therefore, "occurrence" suggests the presence of the asbestos onboard the ships. Under a narrower reading, "occurrence" might mean each individual mariner's exposure to asbestos. Unlike the phrase "claims hereunder", an examination of the term "occurrence" in the context of the deductible provision does not elucidate its meaning. It is therefore not clear to me what "occurrence" means in the context of multiple injuries arising from exposure to asbestos. Because either of the above interpretations is reasonable in the context of the provision, I conclude that the term is ambiguous. *Cf. Uniroyal,* 707 F. Supp. at 1382 ("the terms of the definition of 'occurrence' are partly ambiguous: they identify a set of possible

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[9] Although the provision states "accident or occurrence", the bankruptcy court and the parties focus on "occurrence" as the pivotal term. So do I.

occurrences, but give little assistance in selecting the proper item from that set").

In concluding that the term was unambiguous, the bankruptcy court applied the "unfortunate events test" to interpret its meaning. When the terms "accident" or "occurrence" in an insurance contract are left undefined, in analyzing the fair and accurate meaning of the terms, New York law suggests application of the "unfortunate events test". *See Arthur A. Johnson Corp. v. Indemnity Ins. Co.*, 7 N.Y.2d 222, 227-28, 196 N.Y.S.2d 678, 683, 164 N.E.2d 704 (1959); *Hartford Accident & Indemnity Company v. Wesolowski,* 33 N.Y.2d 169, 173, 350 N.Y.S.2d 895, 899, 305 N.E.2d 907 (1973). Under that test, an "accident" or "occurrence" is not equivalent to the injury suffered by each victim. Rather, "accident" and "occurrence" are given their common sense meaning: "an event of an unfortunate character that takes place without one's foresight or expectation." *Id.* The *Uniroyal* court distilled from these decisions the following summary:

> All that can surely be drawn from those two cases is that the "unfortunate event" is not the "negligent act or omission" and it is not the injury to each victim. The "unfortunate event" is evidently one of the several happenings, with the exception of the negligent act or omission, which precedes and contributes to the resulting injury.

707 F. Supp. at 1382.

The bankruptcy court applied this test and concluded that the "unfortunate event" for the purpose of defining "occurrence" was the presence of

asbestos onboard the ship. If no extrinsic evidence had been offered by the parties, this analysis may have been decisive. However, American Club had offered evidence of the conduct of the parties subsequent to the formation of the policies, which it alleges sheds light on the definition the parties intended to place upon the term. The bankruptcy court determined that because the term was unambiguous, it could not consider this extrinsic evidence.

When provisions of an insurance contract are ambiguous, the court may consider extrinsic evidence presented by the parties in order to ascertain their intended meaning. Properly considered extrinsic evidence includes evidence of the parties' practice with respect to the contract after its formation. Indeed, the parties' practical construction should be given "great, if not, controlling weight in the construction of the contract." *Viacom Intern., Inc. v. Lorimar Productions, Inc.*, 486 F. Supp. 95, 98 n.3 (S.D.N.Y. 1980) (Weinfeld, J.) (citing *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118, 57 L. Ed. 1410, 33 S. Ct. 967 (1913)); *accord Ocean Transp. Line v. AM. Philippine Fiber Ind.*, 743 F.2d 85, 91 (2d Cir. 1984) ("The parties' interpretation of the contract in practice, prior to litigation, is compelling evidence of the parties' intent."); *Studley v. National Fuel Gas Supply Corp.*, 107 A.D.2d 122, 485 N.Y.S.2d 880, 884 (A.D. 4th Dep't 1985) ("the practical construction put upon a contract by the parties in performing under it is of great importance in determining its meaning"); *Webster's Red Seal v. Gilberton World-Wide*, 67 A.D.2d 339, 415 N.Y.S.2d 229, 230 (A.D. 1st

Dep't 1979) (court looked to parties' practical construction of agreement as "persuasive evidence of the agreed intention of the parties"), *aff'd* 53 N.Y.2d 643, 438 N.Y.S.2d 998, 421 N.E.2d 118 (1981).

Thus, it is not only proper for the court to consider evidence of the parties' practical construction, it may place great reliance on it in construing the meaning of the deductible provision.

Having concluded that the term "occurrence" is indeed ambiguous, I further conclude that the bankruptcy court should have considered extrinsic evidence of the parties' practice with respect to the deductible provision.

American Club asserts that in recent years its practice and the practice of its members (including PLI) has been to apply the deductible to each seaman injured by his exposure to asbestos under a particular triggered policy. MALC does not dispute that with regard to asbestosis claims, the practice of the parties has been to apply one deductible per injured seaman. MALC instead challenges the relevance of that practice in light of the assertedly small number of asbestosis claims involved in proportion to the total number of claims. Moreover, MALC asserts that the practice of the parties is contradictory because with respect to accidents resulting in multiple injuries, American Club has in the past applied one deductible regardless of the total number of claims. MALC First Brief at 15-16.

As to MALC's latter assertion, the only practice of the parties that is relevant to the practical interpretation of the deductible provision is the

parties' conduct with respect to asbestosis claims. Given the vast difference between the nature of an injury caused by a spontaneous accident and that caused by years of exposure to asbestos on ships, the parties' practice in applying deductibles in the former category of injuries sheds no clear light on the definition of occurrence when it comes to the latter category.

The extrinsic evidence submitted to the bankruptcy court by American Club was contained in an affidavit, R1 at 391, and in P 13 of the parties' Agreed Statement of Facts, R1 at 404-05, both setting forth American Club's policy with respect to applying deductibles to asbestotic disease claims. The affidavit's sole reference to PLI is contained in the following sentence: "Members, including Prudential, who have submitted such [asbestotic disease] claims, have been aware of the Club's practice and policy [respecting deductibles] in that regard." R1 at 391. Nor does the Statement of Facts refer specifically to PLI's practice in applying deductibles under the policies. This evidence, therefore, fails to sufficiently detail the *parties' practice,* as distinguished from American Club's *policy,* in applying deductibles. I do not read the relevant cases as permitting a court, in discerning the parties' intent, to give conclusive weight to evidence of only one party's interpretation of the contract, established years after the parties entered into the contract, without evidence that the other party concurred in that interpretation. Although the evidence American Club points to does not necessarily support its contention, American Club has at least put forward the possibility, uncontested by

MALC, that such a practice between the parties occurred.

A decision on summary judgment is appropriate under New York law where the extrinsic evidence offered to provide evidence of the parties' intent regarding an ambiguous term is immaterial or fails to raise an issue of credibility or a choice among reasonable inferences. *See Wesolowski*, 33 N.Y.2d at 172, 350 N.Y.S.2d at 898; *Uniroyal*, 707 F. Supp. at 1373; *Alfin, Inc. v. Pacific Ins. Co.*, 735 F. Supp. 115, 118 (S.D.N.Y. 1990). However, when a reviewing court determines that a provision is ambiguous and that extrinsic evidence may more fully disclose the parties' intent, the court should remand the case to the trial court for "any necessary consideration and findings" unless all extrinsic evidence on the issue has already been presented to the trial court. *U.S. Fire Ins. Co. v. General Reinsurance Corp.*, 949 F.2d at 574.

I think the case at bar falls within the latter rule. It is unclear on the present record whether all extrinsic evidence relating to the parties' course of dealing with respect to applying deductibles to claims arising from exposure to asbestos has been presented. Accordingly, the case will be remanded to the bankruptcy court to consider any additional extrinsic evidence on the issue. If extrinsic evidence does not resolve the question, application of the *contra proferentem* rule will.

IV. *"Liman" Recycling Issue*

As the phrase implies, "Payment & Indemnification" policies require the insured to first pay a

claimant before the insurers's duty to indemnify the insured arises. The policies involved in this case are no exception, as Judge Conrad held. Because the PLI Disbursement Trust has insufficient funds to pay the full amount of the settlement to each claimant, the "Second Amended Joint Plan of Reorganization as Modified" provides a method of triggering American Club's duty to indemnify by using the rather small amount of funds contained in the Trust. Section 4.05.07(a)(ii) of the Plan contains a so-called "Liman" provision which operates to provide to the Trustee a means of satisfying the "pay first" obligation contained in the policies. The provision reads in relevant part as follows:

> the PLI Disbursement Trustee is authorized to enter into arrangements under which in substance the PLI Disbursement Trust pays the Allowed Insured Claim in full in cash; the holder of the Allowed Insured Claim repays in cash the full amount of the Deductible Claim and the Club or other insurer reimburses the PLI Disbursement Trust in cash for the full amount of the Excess Claim (and any previously unreimbursed defense costs in excess of the applicable deductible incurred in connection with liquidation of the Claim); and the holder of the Allowed Insured Claim is given an Allowed Claim in Class 5C in the amount of the Deductible Claim.

R1 at 133.[10] This provision is patterned after the method approved in *Liman v. American Steamship Owners Mutual Protection and Indemnity Associations*, 299 F. Supp. 106 (S.D.N.Y.), *aff'd* 417 F.2d 627 (2d Cir. 1969) (per curiam), *cert. denied*, 397 U.S. 936, 25 L. Ed. 2d 116, 90 S. Ct. 946 (1970). In *Liman*, the court held that an insurer was obligated to indemnify a bankruptcy trustee who settled tort claims against the estate by paying the entire amount of the claims subject to the claimant repaying the bankruptcy estate $1,000 (representing the deductible) in exchange for a general claim against the estate.

American Club urged the bankruptcy court to hold the Plan provision unenforceable against the P & I policies it provided PLI. In his summary judgment opinion, Judge Conrad rejected American Club's entreaty and approved the *Liman* provision in the Plan, noting that American Club had not cited "a single valid authority for its position that the 'pay first' provision of an indemnity policy is not satisfied when an insolvent insured borrows funds to make an actual payment." R1 at 689. Accordingly, the court concluded that "if the insured pays the claim, whether with or without funds borrowed from Claimants, it has satisfied the plain language of the policy." *Id.* Under the stipulation of settlement approved by the bankruptcy court on March 9, 1993, the PLI Trust pays each claimant the entire amount of the claim subject to the claimant lending back to the Trust a sum up to

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[10] The sum of $300,000 has been placed in the Trust for the purpose of satisfying claims under this arrangement.

and including the entire amount of the claim, to be repaid by the Trust after American Club indemnifies PLI. *See* PP 11 and 12 of the so ordered stipulation, R2 at 5-6. While this recycling of funds appears to be of broader scope than that contemplated in § 4.05.07(a)(ii) of the Plan, quoted *supra*, it is the practice established by the so ordered stipulation, and its propriety is challenged on appeal.[11]

On appeal, American Club launches a two-fold attack on the *Liman* arrangement. Initially, it argues that the procedure is impermissible as it applies to American Club's P & I policies because *Liman* was wrongly decided. American Club asserts that *Liman*, resting on questionable reasoning, establishes an arrangement by which an insured's obligation to "pay first" becomes illusory, in derogation of the policy. But the Second Circuit affirmed *Liman*.

Recognizing that this Court has no power to overturn *Liman*, American Club next argues that the decision should be limited strictly to its facts and not applied to the case at bar.[12]

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[11] This recycling of claim payments has already been implemented with respect to many of the MALC claimants, resulting in the First Partial Judgment amount of $66,160,000.

[12] Citing Bankruptcy Rule 3020(b)(1), MALC argues that because American Club did not appeal the confirmation of the Plan, it has effectively waived any objections to the *Liman* provision. I disagree. The Plan merely authorizes the Trustee to enter into certain arrangements in order to trigger indemnification under its P & I policies. As the bankruptcy court properly held, the Plan did not alter the contractual obligations between American Club and PLI

In *Liman*, District Judge Mansfield (as he then was) reasoned that because the claimant became a creditor of the estate in the amount of the deductible, the insured had in good faith sustained an actual loss for which indemnification should be made. *Id.* at 109. The *Liman* court further reasoned that to allow an insurer to "avoid making reimbursement simply on the ground that the Trustee had not ultimately paid the [amount] out of its own pocket, the result would indeed be to 'permit the insurer to take advantage of the financial status of its insured and deprive the ultimate beneficiary claimant of his judgment.'" *Id.* (quoting *Henegan v. Merchants Mutual Insurance Co.*, 31 A.D.2d 12, 294 N.Y.S.2d 547 (1st Dep't 1968)). MALC argues that this reasoning lends approval to the recycling procedure in the case at bar. I disagree.

Although this language at first blush appears to confer broad approval upon the triggering of indemnification by any financing arrangement, a careful analysis of *Liman* demonstrates that its holding does not endorse the sort of arrangement contemplated here. Because I conclude that the *Liman* holding is limited to the specific circumstances of that case and because I have found no case permitting satisfaction of a "pay first" provision in a P & I policy by paying the entire claim to a claimant who then lends the entire amount (or a substantial part thereof) back to the insured, subject to repayment only when the

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under the policies. Accordingly, even though the Plan permits various arrangements to be made by the Trustee, the arrangements must still comport with the terms of the policies in order for indemnification to occur.

insured is indemnified, I conclude that the arrangement approved in the stipulation does not trigger American Club's obligation to indemnify.[13]

The operation of the indemnification arrangement and the reason for it in *Liman,* are in crucial respects different from the procedure contemplated here. In *Liman,* only the portion of the claim which represented the amount of the *deductible* was financed. The court emphasized that the debtor paid out of its own funds, without resort to borrowing from the claimant, the entire amount for which it would be reimbursed, namely, the claim minus the deductible. Indeed, the *Liman* court distinguished at least one case cited by the insured on that basis. *Id.* at 110. Although the court held that the insurer should not concern itself with the source of the insured's funding, the court reasoned that this was

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[13] To the extent section 4.05.07(a)(i) of the Plan authorizes the financing of the deductible amount alone, I hold that such an arrangement triggers the indemnification obligation contained in the P & I policies, for the reasons stated in *Liman.* American Club argues that because no specific premiums or assessments were paid prior to the 1977 insurance year to cover loss as a result of asbestos exposure, American Club would be receiving no "windfall" if it failed to indemnify PLI for the asbestos losses under the recycling arrangements and, therefore, the *Liman* reasoning should not apply here. This argument is without merit. American Club does not claim that the policies prior to the 1977 year do not *cover* asbestos claims. PLI paid substantial premiums and assessments for those years covering risk of personal injury. Accordingly, American Club did receive premiums for PLI during those years and the rationale of *Liman* continues to apply.

because the sole amount financed represented the deductible and the insured "is not required to reimburse the estate for losses [less than the deductible amount] suffered by the claimants." *Id.* at 110. The court's reasoning was significantly influenced by the debtor's having paid, without any financing, the entire amount of the reimbursable claim, which it concluded was the only amount with which the insurer should be concerned.

I cannot derive a similar comfort from the arrangement here. In this case, the PLI Disbursement Trust will finance not only the deductible, but the entire amount of the claims for which it seeks to be reimbursed. As this amount must be above and beyond the deductible amount, I cannot disregard American Club's concerns about the source of the funds, as the court could in *Liman,* and the legitimacy of the estate's loss.

Moreover, despite the *Liman* court's broad language regarding the insurer taking advantage of the financial position of the insured, the court's concern was clearly in preventing the insurer from escaping its liability to indemnify merely because the insured was unable, owing to bankruptcy complications discussed *infra,* to pay out of its own funds "the relatively few thousand dollars required to satisfy defendant's concept that the assured must 'absorb' the deductible." *Id.* at 108. Thus, in reaching its decision the court carefully weighed the consequences of financing only the deductible, not the entire claim. As such, the decision, despite its broad language, does not analyze and offer authority

for the financing of entire claims greater than the deductible amount, as PLI seeks to do here.

Furthermore, the endorsed necessity for "borrowing" the deductible funds in *Liman* differs significantly from the need for financing the payments here. In *Liman,* the debtor's estate could not be permitted to pay the amount representing the deductible as it would amount to an illegal preference since the estate would not be reimbursed for that portion of the payment. Thus, even if the estate had the funds with which to pay the deductible, it could not do so except to the detriment of priority creditors. By contrast, PLI's desire to recycle is not significantly motivated by a concern for avoiding illegal preferences. Instead, the asserted necessity for the procedure is merely the Trust's inability to pay the claims without borrowed funds.

Having carefully reviewed *Liman,* I conclude that it does not countenance an arrangement whereby the entire amount of a claim is financed by the recycling procedure provided in the Plan and in the so ordered stipulation.[14] The so ordered stipulation requires the Trust to finance the payment of each claim by paying the amount of the claim to a claimant, who immediately upon receipt, loans a sum up to the entire amount of the claim back to the Trust in exchange for a claim against the estate. I do not agree that the Trust suffers a real loss by such a method of pay-

[14] As it presents an entirely different situation, I take no position on the permissibility of triggering indemnification by borrowing funds from third parties other than claimants.

ment. The loan is "non-recourse." And, despite the fact that the claimant may receive a claim against the estate in exchange for the loan representing the amount of the loan in excess of the amount for which PLI is ultimately reimbursed, such claim is insubstantial given that the estate will not have anywhere near the funds necessary to satisfy even a fraction of those claims. Accordingly, to the extent the Plan and the so ordered stipulation permit an amount greater than the deductible to be financed in this manner, I hold that such method fails to trigger the "pay first" provision in the P & I policies.

V. *Post-Petition Interest on Past Due Premiums and Assessments*

It is undisputed that American Club has a net claim against PLI for $1,270,980 in unpaid premiums and assessments for the years 1979, 1983, 1984, and 1985. PLI has not sought indemnification under any of those policies. Judge Conrad ruled that American Club is permitted under 11 U.S.C. § 553 to offset this amount against sums payable to the Trustee under triggered policies. If American Club chooses to exercise this right to "setoff", Judge Conrad held that the exercise will "resuscitate the Trust's rights to receive contractual benefits under these policies including rights to indemnification for amounts paid to Asbestosis Claimants for personal injuries." R1 at 694, 696. These portions of the bankruptcy court's ruling are not challenged on appeal.

American Club instead appeals the court's denial of its request for post-petition interest on the amount of its "setoff" under § 506(b). The

bankruptcy judge denied American Club's request for interest as untimely, holding that the Plan's failure to include such interest should have been raised at or prior to confirmation of the Plan pursuant to Bankruptcy Rule 3020(b)(1) which provides:

> Objections to confirmation of the plan shall be filed with the court and served on the debtor, the trustee, any committee appointed under the Code and on any other entity designated by the court, within a time fixed by the court. An objection to confirmation is governed by Rule 9014.

American Club argues that the bankruptcy court's refusal to grant interest was erroneous. I disagree. A confirmation of a Chapter 11 bankruptcy plan binds creditors to its terms. "Once a plan is confirmed, neither a debtor nor a creditor may assert rights that are inconsistent with its provisions." *In re Laing,* 146 Bankr. 482, 484 (Bankr. N.D.Okla. 1992). In this case, the Plan does not specifically provide for post-petition interest on American Club's setoff claim. Since American Club did not object to the Plan's failure to provide post-petition interest, its post-confirmation request is untimely. *See Matter of Chappell,* 984 F.2d 775 (7th Cir. 1993) (post-confirmation and post-discharge request for post-petition interest under § 506(b) by holder of oversecured claim who did not object to plan's failure to provide such interest, was denied as untimely). Accordingly, given its untimeliness, Judge Conrad correctly rejected American Club's

application for post-petition interest on its setoff claim.

VI. *Jurisdiction of Bankruptcy Court to Enter August 4 Order and First Partial Judgment*

American Club argues that because of this pending appeal the bankruptcy court had no jurisdiction to issue the August 4 Order directing American Club's compliance with the Plan and reimbursement of the Trustee for sums expended in accordance with *Liman*, and the First Partial Judgment ordering American Club to reimburse the Trustee for $66,160,000 expended pursuant to the so ordered stipulation of settlement. Having reviewed the Club's arguments and the governing precedent, I conclude that the bankruptcy court retained jurisdiction to undertake those actions.

It is well established that the filing of an appeal divests the lower court of its control over matters on appeal. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 74 L. Ed. 2d 225, 103 S. Ct. 400 (1982) (per curiam). The same legal principle applies to appeals of bankruptcy court orders. *See Bankruptcy Deskbook*, Harvey M. Lebowitz, Practicing Law Institute (1986) ("The filing of a notice of appeal divests the bankruptcy court of any further jurisdiction over the issues appealed."); *In re Bialac*, 694 F.2d 625, 627 (9th Cir. 1982); *In re Neuman*, 67 Bankr. 99, 101 (S.D.N.Y. 1986); *In the Matter of the Commodore*

Corp., 87 Bankr. 62, 63-64 (Bankr. N.D.Ind. 1987) (A bankruptcy court has no jurisdiction "to do anything that impacts on any issue or matters under appeal.")

This principle is founded upon a concern for ensuring the integrity of the appellate process. To this end, a lower court may take no action which interferes with the appeal process or with the jurisdiction of the appellate court. *See In re Wonder Corporation of America*, 81 Bankr. 221, 224 (Bankr. D.Conn. 1988); *In re Kendrick Equipment Corp.*, 60 Bankr. 356 (Bankr. W.D.Va. 1986); *In re Urban Development Limited, Inc*, 42 Bankr. 741, 743 (Bankr. M.D.Fla. 1984). It is equally established, however, that while an appeal of an order or judgment is pending, the court retains jurisdiction to implement or enforce the order or judgment. *See e.g. C.H. Sanders Co. v. BHAP Housing Devel. Fund Co.*, 750 F. Supp. 67, 69 (E.D.N.Y. 1990). This is true because in implementing an appealed order, the court does not disrupt the appellate process so long as its decision remains intact for the appellate court to review.

Courts have accordingly recognized a distinction in the divestment of jurisdiction between acts undertaken to enforce the judgment and acts which expand upon or alter it; the former being permissible and the latter prohibited. This distinction was noted by the Sixth Circuit in *N.L.R.B. v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987), which explained it as follows:

> The mere pendency of an appeal does not, in itself, disturb the finality of a judgment

> . . . . The district Court has jurisdiction to act to enforce its judgment so long as the judgment has not been stayed or superseded . . . . Although a district court may not alter or enlarge the scope of its judgment pending appeal, it does retain jurisdiction to enforce the judgment.

See also In re Bencker, 122 Bankr. 506, 510 (Bankr. W.D.Mich. 1990) (discussing Sixth Circuit cases); *Becherer v. Merrill Lynch, Pierce, Fenner & Smith*, 809 F. Supp. 1259, 1270 (E.D.Mich. 1992) (district court had jurisdiction to issue injunction against relitigation of claims in state court despite appeal of the court's judgment on which collateral estoppel was premised; such action would be an enforcement of the judgment, not an expansion of it). The application of this distinction is most germane in the context of a Chapter 11 bankruptcy case which involves the court's issuance of innumerable orders involving a myriad of issues, one or more of which may be on appeal at any given moment. Permitting a court to enforce its orders, while prohibiting it from expanding upon them, allows the least disruption of the court's administration of a bankruptcy plan. Thus, it has long been held that in the absence of a stay pending appeal of the plan confirmation, the bankruptcy court is entitled to implement the plan. *See In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981); *Matter of Commodore Corp.*, 87 Bankr. at 63 (in absence of stay pending appeal of plan, notice of appeal did not deprive bankruptcy court of jurisdiction to make technical modification to plan to

permit it to go into effect only if no stay was subsequently issued); *In Re AOV Industries, Inc.*, 46 Bankr. 190 (D.C. 1984) (in absence of stay pending appeal of confirmed plan, bankruptcy judge entitled to implement plan).

This distinction between acts of enforcement and acts of alteration is reinforced by the cases cited by American Club, and those found by this Court, holding that a bankruptcy court lacked jurisdiction to undertake a particular act. In each of the cases, the bankruptcy court either tampered in some manner with the appealed order or sought to make a decision on a contested issue identical to one on appeal. *See e.g. In re Neuman*, 67 Bankr. 99, 101 (S.D.N.Y. 1986) (bankruptcy court had no jurisdiction to modify appealed order); *Charles & Lillian Brown's Hotel, Inc.*, 93 Bankr. 49, 52 (Bankr. S.D.N.Y. 1988) (court had no jurisdiction to reconsider order while it was on appeal); *In re Wonder Corp.*, 81 Bankr. at 225 (appeal from order granting attorney's fees divested court of jurisdiction to consider motion for sanctions based upon same conduct giving rise to appeal); *Matter of Excavation Construction, Inc.*, 8 Bankr. 752, 760 (D.Md 1981) (while order was on appeal, court had no jurisdiction to modify order to change the date on which debtor's payments were to begin).

The many cases which have determined that a bankruptcy court had jurisdiction to implement an order while it is on appeal lend further support to the significance of this distinction. *See e.g. In re Bencker*, 122 Bankr. at 509 (pendency of appeal from prior determination that fire insurance proceeds were property of the estate did not

deprive bankruptcy court of jurisdiction to distribute the proceeds); *Matter of Davison*, 95 Bankr. 665, 666 (Bankr. W.D.Mo. 1988) (bankruptcy court had jurisdiction to enter order distributing funds of estate, including payment of attorney's fees, despite pending appeal from prior order of the court partially denying attorney's fees); *Matter of Cossett*, 51 Bankr. 166, 169 (Bankr. S.D.Ohio 1985) (court had jurisdiction to consider both Trustee's motion to effectuate sale of property and debtors' objection to confirmation of the sale, despite pendency of appeal of court's prior order permitting sale of the property).

In its summary judgment opinion and its corresponding January 10, 1993 Order and Judgment, the bankruptcy court held that the *Liman* provision of the Plan was valid and enforceable and that the recycling procedure satisfied the *Liman* provision. The propriety of the bankruptcy court's decision on the *Liman* issue was clearly an issue on appeal in this Court at the time the bankruptcy court issued its August 4, 1993 Order and the First Partial Judgment. The August 4 Order directs American Club to fully comply with the bankruptcy Plan, including the *Liman* provision contained therein. The First Partial Judgment orders American Club to reimburse the Trustee for sums expended pursuant to the so ordered stipulation which embodies the approved *Liman* recycling arrangement. American Club also contends that the other issues on appeal in this Court involving the determination of allocation of coverage and application of deductibles are equally implicated in both Judge Conrad's August 4 Order and the First Partial Judgment.

While the *Liman* issue and other insurance coverage issues may have been implicated in the August 4 Order and the First Partial Judgment, the merits of those issues were not addressed. The issues were only implicated insofar as necessary to enforce the court's previous decision on summary judgment. Judge Conrad did not revisit the issues; he did not modify, alter or reconsider his decision; he did not reach the merits of the issues. He merely ordered American Club to act in accordance with the terms of the Plan and with his decision. Because Judge Conrad simply enforced his decision and accompanying Order and Judgment, which had not been stayed pending this appeal,[15] his issuance of the August 4 Order and the First Partial Judgment did not frustrate or moot the appeal or have any other impact on the appeal. I conclude, therefore, that the bankruptcy court's actions were not taken without jurisdiction because they were undertaken merely to execute or enforce his decisions which were pending appeal in this Court.

VII. *Denial of Due Process in the Issuance of the First Partial Judgment*

The last issue on appeal is whether the process by which the First Partial Judgment was reached denied American Club what it terms "due process of law". American Club argues that the bankruptcy court's order that American Club indem-

[15] The record does not reveal whether American Club sought a stay of the Order and Judgment in the bankruptcy court. It is clear, however, that none was issued by that court and that none was sought or issued by this Court.

nify the Trustee for over sixty-six million dollars violates due process for several reasons: (1) because it had received no notice of the stipulation of settlement between MALC and the Trustee before it was "so ordered"; (2) because it has been given little to no information with which to evaluate the reasonableness of the settlements with claimants; and (3) because no evidentiary hearing on the settlements and indemnification was held before the First Partial Judgment was issued. American Club also argues that it is entitled to discovery regarding the reasonableness of the settlements because the P & I policies require its approval before settlements can be reached.

Because I conclude that American Club is entitled to sufficient discovery to evaluate the reasonableness of the settlements, whether the losses fall within the policies' coverage, and the potential liability of PLI, I vacate the August 4 Order and the First Partial Judgment and remand the case to the bankruptcy court for further proceedings consistent with this opinion.

As a preliminary matter, I conclude that the P & I policies do not, as American Club contends, require American Club's approval before PLI may enter into settlements as a prerequisite to its obligation to indemnify. No language in the policies requires American Club's approval of settlements of personal injury claims arising under Paragraph One of the policies. American Club points in vain to two provisions of the contracts in support of its argument. Paragraph 20, entitled "Defense of Claims" provides:

> Whenever required by the Association, the Assured shall aid in securing information and evidence and in obtaining witnesses and shall cooperate with the Association in the defense of any claim or suit or in the appeal from any judgment, in respect of any occurrence as hereinbefore provided.

R1 at 237. Paragraph 21, entitled "Assumed Contractual Liability", provides in relevant part:

> Unless otherwise agreed by endorsement hereon, the Association's liability shall in no event exceed that which would be imposed on the Assured by law in the absence of contract . . . .

Id.

I find nothing in either of these provisions which imposes the approval requirement American Club now seeks to establish. The first provision addresses PLI's responsibility to assist in the defense of the action. The second provides that American Club is not liable for indemnifying PLI for a loss arising solely from contractual, rather than legal, liability. Neither of these provisions makes any reference to settlement of claims. Yet, American Club knew how to specifically require prior approval of settlements when it so intended. Under Paragraph Three of the provision covering certain losses arising from collision, subdivision (d) provides that:

> The Association shall not be liable for any claims hereunder where the various liabilities resulting from such collision, or any of them, have been compromised, settled or

adjusted without the written consent of the Association.

No equivalent mandate is provided in the policies with respect to losses arising under Paragraph One. Because I find these provisions to be unambiguous with respect to any requirement for approval of settlements, I need not consider the extrinsic evidence American Club offers on this subject. *See Maryland Casualty Company v. W.R. Grace and Co.*, 23 F.3d 617, 625 (2d Cir. 1994) (amended opinion). I conclude, therefore, that the P & I policies do not require that PLI obtain approval of American Club before entering into any settlement of claims for personal injuries purportedly covered by the First Paragraph of the policies.

Although PLI is not required to obtain American Club's approval before settling, it does not automatically follow that American Club is bound to indemnify PLI for any settlement of personal injury claims it enters into. MALC argues that because American Club allegedly refused to defend and/or pay the claims, it is obligated to indemnify PLI for any settlements it reaches. This contention is insupportable. Even when an insurer breaches a duty to defend, the insurer need not indemnify its insured for a settlement which is either unreasonable *(see George Muhlstock v. American Home Assurance*, 117 A.D.2d 117, 502 N.Y.S.2d 174, 180 (A.D. 1st Dep't 1986)), or which covers losses not falling within the ambit of the policy. *See Servidone Construction Corp. v. Security Insurance Co.*, 64 N.Y.2d 419, 424, 488 N.Y.S.2d 139, 477 N.E.2d

441 (1985). Further, when an insured settles after an insurer declines coverage, "the insured need not establish actual liability to the party with whom it has settled 'so long as * * * a potential liability on the facts known to the [insured is] shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the [insured].'" *Luria Bros. & Co. v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1091 (2d Cir. 1986) (citing *Damanti v. A/S Inger*, 314 F.2d 395, 397 (2d Cir.) *cert. denied*, 375 U.S. 834 (1963)) (alterations in *Luria*). I see no reason why those principles should not apply to the settlements reached here.

I hold, therefore, that American Club is entitled to discovery sufficient to explore whether the settled losses fall within the scope of the policies' coverage, whether the settlements are reasonable, and whether PLI was potentially liable to each of the claimants. I do not purport to set forth the scope of that discovery except to note that it should include, at the least, the names of the settling seamen, the dates of their service on PLI ships, and the extent of each mariner's injuries. American Club is not required to reimburse the Trustee for settlements paid until it has at least had an opportunity to obtain such discovery and to challenge, if it so chooses, the reasonableness of the settlements.

I further conclude that the bankruptcy court's failure to determine the reasonableness of the settlements, further undermines its orders that American Club indemnify the Trustee for sums

expended pursuant the so ordered stipulation of settlement. In bankruptcy cases, the court must approve any settlement of claims against the estate by the debtor as "fair and equitable". *See Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424, 20 L. Ed. 2d 1, 88 S. Ct. 1157 (1968); *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988). The decision to approve settlements lies within the discretion of the bankruptcy court (*see In re Texaco, Inc.*, 84 Bankr. 893 (Bankr. S.D.N.Y.), *appeal dismissed*, 92 Bankr. 38 (S.D.N.Y. 1988)), and a decision to approve should not be overturned unless it is a clear abuse of discretion. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) *cert. dismissed*, 113 S. Ct. 1070 (1993); *In re Purofied Down Products Corp.*, 150 Bankr. 519, 522 (S.D.N.Y. 1993).

In setting forth the standards for evaluation of a settlement, the Supreme Court explained that:

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors rel-

> evant to a full and fair assessment of the wisdom of the proposed compromise.

390 U.S. at 424.

The bankruptcy court is not required to conduct an independent investigation in determining whether a settlement is reasonable; it is entitled to give weight to the informed opinion of the Trustee and counsel that the settlement is fair and equitable. *See In re Purofied Down Products,* 150 Bankr. at 522; *In re Carla Leather,* 44 Bankr. 457, 466 (Bankr. S.D.N.Y. 1984), *aff'd* 50 Bankr. 764 (S.D.N.Y. 1985). It is not the court's responsibility to conduct a "mini-trial" on the merits in order to assess the reasonableness of the settlement. Rather, the court need only "canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" *In re W.T. Grant Co.,* 699 F.2d 599, 608 (2d Cir.) (quoting *Newman v. Stein,* 464 F.2d 689 (2d Cir.), *cert. denied,* 409 U.S. 1039 (1972)), *cert. denied,* 464 U.S. 822 (1983).

In formulating its independent judgment, the bankruptcy court should consider numerous factors including: (1) the probability of success in the litigation; (2) the difficulties that may be encountered in collection; (3) the complexity of the litigation and the attendant expense, inconvenience, and delay; and (4) the "paramount" interest of the creditors. *See In re Drexel Burnham,* 960 F.2d at 292; *see also In re Purofied Down Products,* 150 Bankr. at 522 (citing *Drexel v. Loomis,* 35 F.2d 800, 806 (8th Cir. 1929)); *In re Carla Leather, Inc.,* 44 Bankr. at 466.

MALC asserts that Judge Conrad "reviewed and approved" the settlement between the numerous asbestos is claimants it represents and the Trustee on several occasions after it was "so ordered" on March 9; including in the First Partial Judgment on review in this appeal. Yet, on no occasion did the bankruptcy court determine the reasonableness of the settlements in accordance with the standards outlined by the Supreme Court and the Second Circuit. I must therefore remand the case to the bankruptcy court for a statement of reasons for approval of the settlement guided by the above precedents.

CONCLUSION

The bankruptcy court's "Memorandum of Decision on Summary Judgment and 11 U.S.C. § 553" and its accompanying "Order and Judgment" are affirmed in part and reversed in part; the Order dated August 4, 1993 and the First Partial Judgment entered September 21, 1993 are vacated; and the case is remanded for further proceedings consistent with this opinion.

It is SO ORDERED.

Dated: New York, New York
July 29, 1994

CHARLES S. HAIGHT, JR.
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 97-5045, 97-5053
February 12, 1998, Argued
October 5, 1998, Decided

In Re: PRUDENTIAL LINES INC.,
Debtor.

LEE J. DICOLA, Trustee of the
PLI Disbursement Trust,
Plaintiff,

ASBESTOSIS CLAIMANTS REPRESENTED BY THE
MARITIME ASBESTOSIS LEGAL CLINIC,
Intervenors-Plaintiffs-Appellants-Cross-Appellees,

—v.—

AMERICAN STEAMSHIP OWNERS MUTUAL
PROTECTION AND INDEMNITY ASSOCIATION, INC.,
Defendant-Appellee-Cross-Appellant.

ALAN KELLMAN, Detroit, MI (Leonard C. Jaques, The Maritime Asbestosis Legal Clinic, on the brief), for Intervenors-Plaintiffs-Appellants-Cross-Appellees.

RICHARD H. BROWN, JR., New York, NY (Kirlin, Campbell & Keating, James M. Maloney, Christy & Viener, on the brief), for Defendant-Appellee-Cross-Appellant.

Before: VAN GRAAFEILAND, JACOBS and LAY,* Circuit Judges. LAY, Circuit Judge, dissenting.

JACOBS, *Circuit Judge*:

The Trustee of a shipping line in bankruptcy, Prudential Lines, Inc., sued Prudential's insurer, American Steamship Owners Mutual Protection and Indemnity Association ("American Club"), seeking declaratory relief clarifying American Club's indemnity obligations for asbestos-related bodily injury claims asserted against Prudential; the asbestosis claimants (the "Claimants") intervened. The issues contested on this appeal arise under the pay first provision; the deductible provision; and the clauses governing indemnity and other insurance.

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* Honorable Donald P. Lay, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

The Pay First Provision. The American Club policies contain a pay first provision requiring that Prudential pay any claims prior to seeking indemnification from American Club. However, bankrupt Prudential lacks the funds to pay the claims. In an effort to satisfy the Claimants and the pay first provision, the reorganization plan set aside $300,000 for use in a recycling arrangement: seriatim, the Trustee disbursed a damages payment to each Claimant, who then returned the money to the Trustee as a non-recourse loan so that it would be on hand to pay the next Claimant, and so on. The United States Bankruptcy Court for the Southern District of New York (Conrad, *J.*) found that this arrangement satisfied the pay first provision. *See In re Prudential Lines, Inc.*, 148 B.R. 730, 750 (Bankr. S.D.N.Y. 1992) ("*Prudential I*"). The district court reversed on the ground that the loan arrangement resulted in no monetary loss to the insured and was a sham. *See In re Prudential Lines, Inc.*, 170 B.R. 222, 242 (S.D.N.Y. 1994) ("*Prudential II*"). The Claimants appeal this ruling.

The Deductible Provision. The American Club policies require the policyholder to pay one deductible "per occurrence." The bankruptcy court held that all asbestos-related bodily injury claims resulting from exposure to asbestos aboard one ship arose from a single occurrence—the presence of asbestos aboard the ship during the policy period—so that a single deductible satisfies the deductible provision with respect to all of those claims. *See Prudential I*, 148 B.R. at 747; *In re Prudential Lines, Inc.*, 202 B.R. 13, 24 (Bankr. S.D.N.Y. 1996) (Gonzalez, *B.J.*) ("*Pru-*

dential III"). The district court reversed, holding that the parties in their course of dealing had attached a practical construction to the deductible provision under which each asbestos bodily injury claim is subject to one deductible. *See In re Prudential Lines, Inc.*, 209 B.R. 621, 626 (S.D.N.Y. 1997) ("*Prudential IV*"). The Claimants appeal this ruling.

The Indemnity and Other Insurance Clauses. American Club argues that when more than one of its policies is triggered by a single loss, the policyholder is entitled to no more than a fractional recovery under each policy. The bankruptcy court held that once triggered by injury-in-fact, each policy was liable for all damages resulting from asbestos exposure, and liability would not be allocated among all triggered policies (although allocation through a contribution action might be permissible). *See Prudential I*, 148 B.R. at 744-45. The district court affirmed. *See Prudential II*, 170 B.R. at 235. American Club cross-appeals from this ruling.

As to each issue, we affirm the judgment of the district court.

BACKGROUND

American Club is a nonprofit mutual insurance association of shipowners that writes protection and indemnity ("P&I") insurance for its shipowner members. Prudential was a member of American Club and a policyholder from 1940 to 1970 and from 1975 to 1986. In early 1986, Prudential filed a bankruptcy petition under Chapter 11.

Over the past 15 years, approximately 5,000 Claimants have alleged that they suffered

asbestos-related bodily injuries by exposure to asbestos while working aboard Prudential's ships, and have sought damages from Prudential for negligence under the Jones Act, 46 U.S.C. § 688 *et seq.*, and for unseaworthiness under the general maritime law.

Each P&I contract is written for a one-year policy period, and provides in the indemnity clause (in pertinent part) that American Club will indemnify the assured against any loss, damage or expense which the assured *shall become liable to pay and shall pay* by reason of the fact that the assured is the owner (or operator, . . . as the case may be) of the insured vessel and which shall result from the following liabilities[,] risks[,] events[,] occurrences and expenditures:

> (1) Liability for . . . personal injury to, or illness of any person . . . .

(emphasis added). The import of the emphasized wording is that Prudential must first pay any claims or judgments against it before obtaining indemnification from American Club. The lack of sufficient funds on hand at the time of Prudential's bankruptcy made outright payment of the claims impossible, so Prudential and its Trustee took the following measures.

The Second Amended Joint Plan of Reorganization (the "Plan"), confirmed in 1990, creates a Prudential Disbursement Trust to resolve asbestos-related claims and to enforce the trust's interests against Prudential's insurers. Section 4.05.07 of the Plan sets aside $300,000 to be used by the Trustee to engage in certain loan arrangements for the replenishment of deductibles:

> The [Prudential] Disbursement Trustee is authorized to enter into arrangements under which in substance the [Prudential] Disbursement Trust pays the Allowed Insured Claim in full in cash; the holder of the Allowed Insured Claim repays in cash the full amount of the Deductible Claim and the Club or other insurer reimburses the [Prudential] Disbursement Trust in cash for the full amount of the Excess Claim . . . ; and the holder of the Allowed Insured Claim is given an Allowed Claim in Class 5C in the amount of the Deductible Claim. . . . The . . . Trustee may *alternatively* enter into *any lawful arrangement designed to achieve the same purpose*, as may be agreed upon by the holder of an Allowed Insured Claim and the . . . Trustee, but . . . may not use funds of the . . . Trust . . . unless adequate assurances and documentation are provided ensuring that the . . . Trust will promptly receive repayment and/or reimbursement of all amounts paid by the . . . Trust.

(emphasis added).

In December 1990, the Prudential Trustee commenced this suit against American Club, seeking a declaration of Prudential's rights under the American Club policies; the Claimants intervened. The bankruptcy court determined that the action was a core proceeding. *Prudential I*, 148 B.R. at 735. In December 1992, in response to cross-motions for summary judgment, the bankruptcy court decided the deductible and allo-

cation issues. American Club appealed those decisions to the district court.

In March 1993, the Prudential Trustee and the Claimants agreed inter se to a Stipulation and Settlement Agreement determining Prudential's liability to the Claimants and authorizing an arrangement for recycling Prudential's $300,000 cash fund as required to satisfy the claims. Under this arrangement, the Trustee would pay Claimant A in cash from the $300,000 set aside under the Plan, and Claimant A immediately would loan the funds back to the bankrupt estate via a non-recourse loan. The replenished fund would then be used to compensate Claimant B, and so on.[1]

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[1] The wording of the Stipulation is as follows:

> 11. Pursuant to the Plan and solely from the Liman Funds, . . . the Trust shall pay (the "Claim Payment") each Allowed Claim . . . . The Claim Payment shall be made to Claimants' Counsel and shall at all times be held by Claimants' Counsel in its trust or escrow account . . . . Immediately upon clearing the account where deposited, the claims from each Claim Payment shall be used by each Asbestosis Claimant to or on behalf of whom a Claim Payment was made, and by Claimants' Counsel to make the Claimant Loan described in paragraph 12 hereof.
>
> 12. In order to facilitate the implementation of the Plan, and further to assist the Asbestosis Claimants in the realization of the proceeds of the Coverage under which the Debtor may have been insured with respect to an Asbestosis Claimant's Insured Claim, each Asbestosis Claimant, through Claimants' Counsel, shall loan (the "Claimant Loan") to the Trust, a sum up to and including the amount of the Claim Payment. . . . The Claimant Loan shall be made in

The bankruptcy court "so ordered" the Stipulation and Settlement Agreement on March 9, 1993, and the Trustee recycled the $300,000 over and over until the Trustee owed $13 million to the Claimants on non-recourse loans. On August 4, 1993, the bankruptcy court ordered American Club to indemnify Prudential for the $13 million. The wheels continued turning, and on September 27, 1993, the bankruptcy court entered a partial judgment requiring that American Club indemnify Prudential for $66.16 million in such claims. American Club appealed those orders. (The bankruptcy court did not permit American Club to conduct discovery as to the reasonableness of these settlements, or actually determine for itself whether the settlements with the Claimants were reasonable. *See infra* note 2.)

On July 29, 1994, the district court (i) reversed the bankruptcy court, holding that the recycling did not satisfy the pay first provision of American Club's policy; (ii) reversed the bankruptcy court's determination on the deductible issue, holding that the term "occurrence," as used in relation to the policy deductible, was ambiguous, and remanding to the bankruptcy court to determine whether extrinsic evidence of practical construction supplied meaning to that term; and (iii) affirmed the bankruptcy court on the allocation

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cash or certified or wired funds immediately upon receipt of the Claim Payment by Claimants' Counsel. . . . The Claimant Loan shall be "non-recourse" to the Liman Funds, the Trust, the Debtor and the Trustee, and . . . neither the Debtor, or the Trust shall have any obligation to repay the Claimant Loan.

issue. American Club then appealed the deductible and allocation issues to this Court, claiming that these issues were ripe for appeal. In addition, the Claimants moved for an interlocutory appeal of the pay first issue pursuant to 28 U.S.C. § 1292(b).

On December 6, 1994—before the appeal was heard in this Court—the bankruptcy court issued an order vacating the Stipulation and Settlement Agreement in light of the district court's rejection of the recycling arrangement.

On June 26, 1995, we dismissed American Club's appeal, and denied the Claimants' motion for interlocutory appeal, finding that: (i) the appeals on the deductible and allocation issues were not ripe because they did not amount to final orders or judgments in light of the district court's remand of the deductible issue; and (ii) the appeal of the pay first issue, although certified by the district court, was better heard at the completion of the bankruptcy proceedings. *See In re Prudential Lines, Inc.*, 59 F.3d 327, 332 (2d Cir. 1995).

Pursuant to the terms of the remand, the bankruptcy court conducted an evidentiary hearing on the parties' practical construction (if any) of the deductible provision. On November 5, 1996, the bankruptcy court found that American Club had failed to prove that Prudential acquiesced to American Club's practice of applying a single deductible per asbestosis claim per policy. In June 1997, the district court concluded that this finding was clearly erroneous, and reversed.

DISCUSSION

The Claimants appeal the district court's ruling on the pay first and deductible issues; American Club cross-appeals the district court's ruling on the allocation issue.

There are two threshold issues.

1. American Club argues that: (i) the Claimants failed to appeal the bankruptcy court's December 6, 1994 order vacating the 1993 Stipulation and Settlement Agreement (which created the recycling arrangement); (ii) this order vacated the Stipulation and Settlement Agreement for reasons other than the district court's ruling on the recycling; and (iii) therefore there is no viable recycling arrangement that could be implemented even if we were to reverse.

A declaratory judgment action presents an actual controversy if "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L. Ed. 826 (1941). Where the contingent event upon which the controversy rests is unlikely to occur, the controversy lacks "sufficient immediacy and reality" to warrant declaratory relief. *See, e.g., Certain Underwriters at Lloyd's v. St. Joe Minerals Corp.*, 90 F.3d 671, 675 (2d Cir. 1996) (finding declaratory judgment action relating to excess insurance coverage not ripe when, *inter alia*, there was no practical like-

lihood that liability would reach excess insurance layers).

We think that the pay first issue continues to present a controversy that is immediate and real. The second premise of American Club's argument is wrong; the bankruptcy court vacated the Stipulation and Settlement Agreement solely because of the district court's decision on the pay first issue, not for other reasons, and therefore a decision favorable to the Claimants on the pay first issue could realistically lead to reinstatement of the Stipulation and Settlement Agreement and its recycling arrangement.[2] Moreover, the Claimants

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[2] In July 1994, the district court held that the recycling arrangement did not satisfy the pay first clause of American Club's policy. *Prudential II*, 170 B.R. at 242. In addition, the district court vacated the bankruptcy court's August 4, 1993 and September 21, 1993 orders requiring American Club to reimburse Prudential for claims paid under the Stipulation and Settlement Agreement, holding that: (i) the bankruptcy court failed to afford American Club discovery on the reasonableness of the Stipulation and Settlement Agreement, and to permit American Club to challenge that Agreement as unreasonable; and (ii) the bankruptcy court failed to determine the reasonableness of the Stipulation and Settlement Agreement "in accordance with the standards outlined by the Supreme Court and the Second Circuit" for the settlements of claims against a bankrupt estate. *Id.* at 247.

Then, on December 6, 1994, while the motion for interlocutory appeal was pending, the bankruptcy court vacated the Stipulation and Settlement Agreement as unfair *because* the district court's ruling (that the loan arrangement did not satisfy the pay first provision) prevented the funding of the settlement. *See In re Prudential Lines, Inc.*, 59 F.3d at 330 ("The bankruptcy court concluded that, in light of the district court's rejection of the *Liman* recycling scheme incor-

properly preserved their appeal of the district court's ruling on the pay first issue: They sought an interlocutory appeal pursuant to § 1292(b),

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porated therein, the Claimants could not be paid and the settlement therefore was not in their best interests."). The court said at a November 24, 1994 hearing:

> Judge Haight directed that I determine whether the original stipulation was fair.
>
> Based upon the facts which have been presented *in reference to the funding of the plan, the funding of the settlement*, it is clear that [the] settlement cannot meet a fairness determination nor can it meet a settlement of a claim or a case *because there is really not a clear ability to fund that settlement without the cooperation of the clubs* . . . .
>
> However, it is clear that *[there is] an inability to fund it* and there has been no evidence to the contrary.
>
> I know [Claimants' attorney] has alluded he can get the money, but the only thing that talks in bankruptcy is money, it appears to me that settlement cannot be implemented. So, therefore, I do not find that it is fair, nor do I find that it is an appropriate settlement under the [*TMT Trailer*] case because it just is not appropriate under these circumstances.

(emphasis added). The bankruptcy court's citation was to *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968), which provides the general test for the fairness of settlements entered as part of a reorganization, *see id.* at 424-25, 88 S. Ct. at 1163 ("The judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise."); citation to that case did not introduce a different reason for the vacatur.

and when that appeal was dismissed as premature, they waited until all issues were final and filed a notice of appeal from the district court's pay first ruling. We have no reason to think that if we were to find error in the district court's determination, the Stipulation and Settlement Agreement could not be reinstated (subject to a fairness hearing on other aspects of the settlement).

2. The conclusion we reach *infra* on the pay first issue means that the recycling arrangement created by the Stipulation and Settlement Agreement cannot be used to trigger American Club's indemnification obligations. We must therefore consider whether this opinion need decide the remaining issues concerning the deductible and the allocation of damages among triggered policies. The answer turns on whether a payment mechanism other than the recycling arrangement is available which renders these issues of sufficient immediacy and reality so as to justify declaratory relief.

At oral argument, the parties agreed that there are other available mechanisms (albeit less efficient) for triggering American Club's indemnification obligations. The Claimants suggested specifically that the $300,000 set aside to fund the recycling could be used to settle individual claims. American Club did not contest the availability of those funds for this purpose, and we do not read the reorganization plan to preclude such use. *See* Plan, § 4.05.07(a)(i) ("The bankruptcy court upon proper motion may authorize the use of such funds for other purposes in connection

with efforts to liquidate Personal Injury Claims . . . ."); *see also id.* § 4.05.07(v). Given the availability of other payment mechanisms, the deductible issue and the allocation issue are of sufficient immediacy and reality to warrant declaratory judgment.

We therefore reach and decide each of the questions presented to us.

I. THE PAY FIRST PROVISION

We agree with Judge Haight's conclusion that the recycling arrangement did not amount to payment under American Club's policy and thus failed to satisfy the policy's pay first provision. The American Club policies require it to "indemnify [Prudential] against any loss, damage or expense which [Prudential] shall become liable to pay and shall pay." Because the American Club policy mandates payment prior to triggering the insurer's indemnification obligations, it is an indemnity policy. Federal maritime law, which applies to this essentially maritime contract, does not speak to the issue of what constitutes payment under an indemnity policy. *See Liman v. American Steamship Owners Mut. Protection and Indem. Ass'n*, 299 F. Supp. 106, 108 (S.D.N.Y.), *aff'd*, 417 F.2d 627 (2d Cir. 1969) (*per curiam*). Because we see no need for a uniform federal rule (and because the parties have agreed that New York law governs), we apply New York law.[3] *See*

[3] As the bankruptcy court noted, New York has the most significant connections to the policies: American Club drafted and issued its policies in New York, and the parties negotiated coverage here as well.

Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 316-17, 75 S. Ct. 368, 372, 99 L. Ed. 337 (1954).

A. Liman v. American Steamship Owners

The recycling arrangement is patterned after a similar device approved by this court in *Liman*, which involved an identical American Club policy. In *Liman*, approximately 120 claims were presented by seamen and longshoremen against a bankrupt shipping company. Although the shipping company had sufficient funds to pay the claims, and although there was no reason to doubt that the company would be indemnified eventually by the insurer (net of the deductible), the Government (the bankrupt's chief creditor) opposed payment of the claims as illegal preferences because "the estate would be diminished to the extent of the $1000 deductible which would be attributed to each of the claims to be defended." *Liman*, 299 F. Supp. at 107.[4] The district court in *Liman* described the financing mechanism adopted to obviate that objection:

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[4] The dissent inadequately characterizes *Liman*. Without support, the dissent recites that "in *Liman*, the estate was able to pay all but $1,000 to each claimant. . . . The promissory notes in *Liman* were directly related to the estate's ability to pay the various claimants." Dissent at [page 10]. In fact, the Government objected to the payment of the debtor's claims in *Liman* because the payment of the deductible would have amounted to a preference, and unlike the rest of the claim, the deductible portion of the payment would not have been reimbursed. In any event, as noted *infra*, we see *Liman* as turning on the limited extent of the recycling arrangement.

> The Trustee therefore proposed to finance the $1,000 deductible in each case by defending each lawsuit pursuant to an agreement with the claimant to the effect that in the event of recovery or settlement in an amount in excess of $1,000, the estate will pay the full amount of the recovery to the claimant and the claimant will thereupon repay $1,000 to the estate, in exchange for which the claimant will become a general creditor of the estate in the sum of $1,000.

Id. at 108. The insurer objected that "in order to be indemnified under the policies the estate must show that it actually 'absorbed' the $1,000 deductible." *Id.*

Liman summarized New York law on what constitutes payment under an indemnity policy (an interpretation which we adopted in our *per curiam* opinion affirming on the district court's opinion): "The test in New York is whether the assured has actually in good faith sustained the loss for which reimbursement is sought, and the insurer's obligation to indemnify may not be avoided because of the assured's insolvency." *Id.* at 109. Thus, an indemnifiable payment entails (i) satisfaction of the claim and (ii) the absorption of some loss thereby by the insured, (iii) both in good faith. *See also Ahmed v. American Steamship Mut. Protection & Indem. Ass'n*, 640 F.2d 993, 995 (9th Cir. 1981) (noting that under New York law an insurer's obligation to pay under an indemnity policy "does not arise until after the insured suffers an actual monetary loss"); 8 John Alan Appleman & Jean Appleman,

Insurance Law and Practice § 4856, at 519 (1981) (hereinafter "Appleman") ("In an action upon an indemnity policy, not only must a judgment have first been recovered against the insured . . . but it must also appear that the insured has suffered an actual monetary loss or damage.").

In holding that the deductible financing arrangement amounted to payment under this standard, the *Liman* court focused on the use of the challenged arrangement only to finance the deductible, the rest of each claim representing a cash loss out of pocket. *Liman*, 299 F. Supp. at 109-10. The court reasoned that: (i) the purpose of the deductible is "to enable the insurer to avoid responsibility for small claims which are usually both numerous and costly" and this purpose was not undermined by the arrangement; (ii) the source of the funds for paying the deductible is of no concern to the insurer because the insurer is not required to reimburse the policyholder for the deductible; (iii) other than the financing of the deductible, "the Trustee would satisfy each judgment against the estate and actually pay out of the estate to the claimant all funds for which reimbursement will be sought from defendant," *id.* at 110; and (iv) given these factors, a failure to find that the insured had paid the claims would permit the insurer to reap a windfall and "to take advantage of the financial status of its insured and deprive the ultimate beneficiary claimant of his judgment," *id.* at 109. Thus the court found that the purpose of the deductible in that case would be served, and that "the Trustee would be seeking reimbursement only for losses actually sustained by the estate."

Id. The court distinguished cases in which recovery on an indemnity policy was denied because in such cases "there was neither a bona fide settlement of judgment obtained by the claimant against the assured nor a payment made by the assured of the amount for which reimbursement was claimed." *Id.* at 110.

Here, Prudential seeks to use the recycling arrangement to finance the whole of the claims, not the deductibles alone. This case thus differs from *Liman* in the essential respect that indemnity is sought for a loss that the policyholder has not incurred. *See Ahmed v. American Steamship Owners Mut. Protection & Indem. Ass'n*, 444 F. Supp. 569, 572 (N.D. Cal. 1978) (distinguishing *Liman* by noting that "the insured has never paid any of the claims against it or arranged to finance such payments"), *aff'd in part, remanded in part*, 640 F.2d 993, 995 (9th Cir. 1981).

B. Applying New York Law

As *Liman* notes, "the test in New York is whether the assured has actually in good faith sustained the loss for which reimbursement is sought." 299 F. Supp. at 109. The only detriment assumed by Prudential vis-a-vis each Claimant is a wholly non-recourse debt, which in financial terms is—and is intended to be—nothing.

The Fifth Circuit has concluded that "*Liman* does not stand for the proposition that 'payment' can be made by the use of a promissory note worthless from the day it is executed." *Conoco, Inc. v. Republic Ins. Co.*, 819 F.2d 120, 122 (5th Cir. 1987). Conoco had paid the salvage cost of raising a vessel that sank while on charter from

the shipowner, Bonanza. Conoco was unable to recover the salvage cost directly from an insurer that had issued a policy protecting the ship and naming both Bonanza and Conoco as assureds because (as the Fifth Circuit held sitting *in banc* in a prior case) Conoco had no obligation to perform the salvage operation. Trying again, Conoco arranged for Bonanza (which presumably *was* obliged to pay the salvage costs of its vessel) to execute a demand promissory note in Conoco's favor for the salvage costs, secured by an assignment of any policy proceeds recovered from the insurer. Bonanza sought indemnification from the insurer on the theory that the note was payment under the policy. *Id.* at 121. However, "at the time [the loan] documents were signed, [Conoco] assured Bonanza's president that it would not attempt to collect the promissory note." *Id.* The court held that the bankrupt's satisfaction of the claim with a non-recourse note did not amount to payment under the indemnification policy:

> Since the bankrupt assured in *Liman* was not completely bereft of assets, the *Liman* court was not faced with the situation we face in this case, where Bonanza is literally incapable of sustaining a loss. . . . Bonanza not only had no intention of paying the promissory note, but offered no hope of eventually providing any value at all in exchange for the note. The company was dormant. Bonanza was gone, and it was not coming back.

Id. at 122-23.

Prudential is blocked by the same obstacle in this suit. The underlying claims were satisfied with non-recourse notes that entail for Prudential no actual loss incurred in good faith. The only difference between the present case and *Conoco* is that here Prudential issues boomerang payments from the $300,000 account. But as these funds immediately came home, the Asbestosis Claimants received nothing of value from Prudential, and Prudential sustained no true loss. We do not think that this sham transaction triggered an indemnification obligation under New York law.

C. *Direct Actions by Claimants Against Marine Indemnity Insurers*

It is obvious for reasons previously stated that the Claimants are the only parties with an interest in the indemnification from American Club. Our holding is therefore independently supported by the doctrine of New York law that bars direct actions by claimants against marine indemnity insurers. *See Ahmed*, 444 F. Supp. at 572 ("Under New York common law, an insurer under an indemnity insurance policy is not liable to an injured person who has obtained a judgment against the insured even though the insured is insolvent and cannot pay the judgment."). Although New York has broadly altered this common law rule by statute, the statute expressly preserves application of the common law rule to marine insurance contracts, such as P&I policies. *See* N.Y. Insur. Law § 3420(i) (McKinney 1985) (referencing § 2117(b)(3) which incorporates marine insurance contracts); *Ahmed*, 640 F.2d at

995-96. "The exception was consciously made by the New York legislature to eliminate a perceived competitive disadvantage to which New York's marine insurers were placed by the direct action statute." *Miller v. American Steamship Owners Mut. Protection and Indem. Co.*, 509 F. Supp. 1047, 1049 (S.D.N.Y. 1981).

We have previously barred a suit by an insured's judgment creditor against a marine policy on the ground that the suit closely resembled a direct action. *See Wabco Trade Co. v. S.S. Inger Skou*, 663 F.2d 369, 371 (2d Cir. 1981) (holding that N.Y. C.P.L.R. § 5201(a), which provides for a money judgment against "any debt," affords no basis for maintaining a direct action against a marine insurer of a judgment debtor); *see also Cowan v. Continental Ins. Co.*, 86 A.D.2d 646, 647, 446 N.Y.S.2d 412, 414 (2d Dep't 1982) (noting that judgment creditor of insured could not bring declaratory judgment against insured's insurer). We will not permit the Claimants, who are the only parties in interest, to evade this bar via an illusory transaction that is of no financial consequence or interest to Prudential as the supposed insured.

New York's approach to insolvent insureds under the common law rule barring direct actions is quite categorical and firm in terms of the type of actual loss required to trigger an indemnification obligation:

> If the insured was insolvent, so that the person injured or the estate of one killed was unable to satisfy the judgment against him, the insurer in effect would be released. The

> policy being one of indemnity against loss suffered by the principal, it followed that the insured having suffered no damage, there was no loss for the insurer to indemnify.

Jackson v. Citizens Cas. Co., 277 N.Y. 385, 389, 14 N.E.2d 446 (1938); *see 175 East 74th Corp. v. Hartford Accident & Indem. Co.*, 51 N.Y.2d 585, 591, 435 N.Y.S.2d 584, 586, 416 N.E.2d 584 (1980) ("The insolvency or bankruptcy of an insured, which prevented payment, necessarily relieved the insurer of any obligation to the insured and the injured party was left without a source of recovery."); *see also In re F.O. Baroff Co.*, 555 F.2d 38, 41 (2d Cir. 1977) (noting that prior to the enactment of the direct action statute, "courts held that in the event of his bankruptcy, the insured, although liable to a third person, suffered no loss since he was unable to pay the one he had injured. Because the insured had not sustained a loss, the insurance company had no liability to the insured."). Thus, as the law stood under New York common law—and as it still stands in relation to marine insurance policies—the insured's lack of assets to satisfy claims against the bankrupt estate typically leaves the insured unable sustain a loss and pay the claim. This is simply one consequence of purchasing a marine policy of indemnity rather than a liability policy.

D. The Authorities Cited by the Claimants

The several New York cases upon which claimants rely either support our conclusion or are distinguishable. In *Campbell v. London &*

Lancashire Indemnity Co., 168 N.Y.S. 300 (Sup. Ct. Erie County 1917), the insured under an indemnity policy, being insolvent, paid a claim with funds borrowed for that purpose from a third party, secured initially by a promissory note, and later (after the funds were used to pay the claimant) by an assignment of the insurance claim for indemnification. The court found that this arrangement satisfied the pay first provision of the policy, but added: "It must be admitted that, if there had been no payment of the judgments to the judgment creditor, but the moneys were to be held by the judgment creditor to await the result of this action, such a pretended payment would be in bad faith, and would defeat plaintiff's right of recovery." *Id.* at 301. In *Campbell*, the funds were actually transferred to the claimant as a bona fide payment of the claim and the party that had been assigned the indemnity right had actually paid the claim and sustained a monetary loss in good faith. That transaction was no doubt facilitated by the permissibility of an assignment of indemnity rights under the policy. The American Club policy prohibits such assignment.[5]

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[5] In *Employers' Liability Assurance Corp. v. International Milk Products Co.*, 192 A.D. 88, 182 N.Y.S. 337 (1st Dep't 1920), the question was whether the insurer could invoke the policy subrogation clause to recover against third parties liable to the insured when the insurer paid the claimant directly before any payment was made by the insured. The court's holding, that direct payment by the insurer of the claim on behalf of the insured triggered the subrogation provision, *id.* at 92, 182 N.Y.S. at 339-40, has no obvious bearing on the present appeal.

Finally, *Feldman v. New York City Health & Hospitals Corp.*, 107 Misc. 2d 145, 437 N.Y.S.2d 491, 496 (Sup. Ct. Kings County), *rev'd*, 84 A.D.2d 166, 445 N.Y.S.2d 555 (2d Dep't 1981), *rev'd*, 56 N.Y.2d 1011, 453 N.Y.S.2d 683, 439 N.E.2d 398 (1982) (adopting New York State Supreme Court opinion), a case having nothing to do with insurance, held efficacious a financial arrangement by which a tort plaintiff financed the payment by a tort defendant. The tort defendant was found 10% liable for the injury, while the third-party defendant was found 54% liable. Under the rule announced in *Klinger v. Dudley*, 41 N.Y.2d 362, 393 N.Y.S.2d 323, 361 N.E.2d 974 (1977), the plaintiff could not recover directly from the third-party defendant, and was in a bind because the defendant was largely insolvent and could not afford a 64% payment. The plaintiff therefore arranged for a lender to finance the defendant's payment of the 64%, and to take in return (i) an assignment of the defendant's contribution rights from the third-party defendant, (ii) a demand note from the defendant guaranteed by the plaintiff without prior recourse to the (insolvent) defendant, and (iii) 25% of any recovery from the third-party defendant as the lender's reward. *Feldman*, 437 N.Y.S.2d at 494. In finding that the arrangement satisfied *Klinger* and triggered the third-party defendant's contribution obligation, the court ruled that: (i) no disservice would be done to the limited policy behind *Klinger*, *i.e.*, to avoid the defendant simply keeping the contribution funds it receives from the third-party defendant without paying the plaintiff, *id.* at 495; (ii) both the plaintiff and

the defendant would be harmed by application of the *Klinger* rule in the circumstances, *id.* at 495-96; and (iii) the defendant's payment to the plaintiff had been financed through a bona fide loan, the proceeds of which were used to fully pay and satisfy the plaintiff's judgment, *id.* at 496.

As the Claimants in the present appeal point out, the *Feldman* court deemed the arrangements made between the plaintiff and the lender to be irrelevant to the bona fide nature of the loan between the defendant and the lender. We think *Feldman* is no help to Claimants here because the non-party lender in *Feldman* performed a real financial service for a real financial reward, whereas the recycling of funds by the Trustee here is an illusion; and the obstacle removed in *Feldman* was a doctrine (*Klinger*) that was intended to protect plaintiffs but in the circumstances had backfired to that plaintiff's detriment, *see id.* at 497 ("The Court will not permit the 'shield' of *Klinger* to be used as a 'sword' by a culpable third party defendant who seeks to escape a judgment against it through an inflexible construction of *Klinger.*"); *see also Reich v. Manhattan Boiler & Equip. Co.*, 91 N.Y.2d 772, 778, 676 N.Y.S.2d 110, 698 N.E.2d 939 (1998) ("The *Feldman* loan agreement was sanctioned for the limited purpose of alleviating the burdens created by *Klinger* in the specific factual circumstances of *Feldman.*"), whereas the obstacle faced by Claimants here is a bargained for contract clause, *see Harris v. Standard Accident & Ins. Co.*, 297 F.2d 627, 631 (2d Cir. 1961), that protects an insurer unwilling to waive it.

Claimants invoke New York's general policy of preventing an insurer from taking advantage of an insured's bankruptcy; but we cannot find that the recycling arrangement adopted by Prudential and the Claimants amounts to payment of the claims under New York law. Accordingly, we hold that the pay first provision of American Club's policy is not satisfied, and affirm the district court.

* * *

The parties' remaining disputes concern principally the number and amount of the deductibles properly payable for each claim. Claimants argue that the presence of asbestos on a particular ship is a single occurrence triggering a single deductible under each policy for all Claimants whose asbestosis injuries arose from their work on that ship. American Club argues not only that each Claimant's injury triggers payment of a separate deductible but also that each claim must be allocated between the various policies in effect during the period of a particular seamen's exposure, thus triggering multiple deductibles. For the reasons discussed *infra*, we find that the answer lies between these two views.

II. THE DEDUCTIBLE PROVISION

The deductible provision in each American Club policy provides (with an inapplicable exception) that personal injury claims "are subject to a deduction" in a stated amount "with respect to each accident or occurrence." In the 1940s and 1950s, the deductibles varied from $250 to $1,000 per accident or occurrence; in the 1960s, 1970s,

and 1980s, they varied from $2,500 to $50,000 (reaching $100,000 in one year). The terms "accident" and "occurrence" are not defined in the policies.

The parties dispute the proper application of the deductible provision in the circumstances of this case. The Claimants argue that the *presence* of asbestos on each Prudential vessel constituted a single occurrence, and that a single deductible applies to all bodily injury claims resulting from asbestos exposure aboard a particular ship within each policy year. American Club argues that each Claimant's initial exposure to asbestos within a policy year constituted a separate occurrence. Under this interpretation, each claim would be subject to a full deductible.

The bankruptcy court concluded that "the occurrence was the presence of asbestos on each [Prudential] vessel during each triggered policy period," and that "each P & I policy obligated to indemnify will be able to claim one deductible, irrespective of the number of claims filed against an individual policy." *Prudential I*, 148 B.R. at 747. The district court reversed and remanded, finding first that the term "occurrence" is ambiguous: "In the broadest sense of its commonly understood definition, therefore, 'occurrence' suggests the presence of the asbestos on board the ships. Under a narrower reading, 'occurrence' might mean each individual mariner's exposure to asbestos." *Prudential II*, 170 B.R. at 237. The district court noted that the parties had presented some extrinsic evidence of a practical construction of the deductible provision and remanded

to the bankruptcy court to develop a fuller evidentiary record. *Id.* at 239.

The bankruptcy court conducted an evidentiary hearing on American Club's practice in interpreting the term "occurrences." The court concluded that "the preponderance of the proffered evidence does demonstrate that American Club's policy for asbestosis claims resulting from exposure prior to 1989 has been to apply a deductible for each policy year in which a particular seaman worked." *Prudential III*, 202 B.R. at 19. However, it concluded that Prudential had not acquiesced in this policy. *Id.* The district court reversed, finding that the bankruptcy court's determination that Prudential had failed to acquiesce in American Club's deductible practice was clearly erroneous. *Prudential IV*, 209 B.R. at 623, 626.

A. Insurance Policy Interpretation Under New York Law

As noted above, although the P&I policy is essentially a maritime contract, its interpretation is governed in this case by New York law. Under New York law, an insurance policy is a contract that is construed to effectuate the intent of the parties as expressed by their words and purposes. *See American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1492 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). "Unambiguous terms are to be given their 'plain and ordinary' meaning." *State of New York v. Blank*, 27 F.3d 783, 792 (2d Cir. 1994). "As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one read-

ing." *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 695 (2d Cir. 1998) (internal quotation marks and citations omitted). The determination of whether an insurance policy is ambiguous is a matter of law for the court to decide. *See Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's*, 136 F.3d 82, 86 (2d Cir. 1998).

If the policy is ambiguous, extrinsic evidence may be introduced to support a particular interpretation. *Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 509 (2d Cir. 1994). If the extrinsic evidence presents issues of credibility or a choice among reasonable inferences, the decision on the intent of the parties is a job for the trier of fact. *See Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1374-75 (E.D.N.Y. 1988).

Ordinarily, if an "ambiguity arises that cannot be resolved by examining the parties' intentions, . . . the ambiguous language should be construed in accordance with the reasonable expectations of the insured when he entered into the contract." *Haber*, 137 F.3d at 697. Courts in such situations often apply the *contra proferentem* rule and interpret a policy against the insurer. *See, e.g., Westchester Resco Co. v. New England Reins. Corp.*, 818 F.2d 2, 3 (2d Cir. 1987) (*per curiam*). Here, however, Prudential was both an insured and an insurer, *see Firma C-Trade S.A. v. Newcastle Protection and Indem. Ass'n*, [1991] 2 App. D.C. 1 (H.L. 1990) ("P&I clubs operate on a system of mutual insurance under which the successful claim of one member is paid out of the contributions of, and the calls made on, all the members including himself. Each member is

accordingly both an insurer and an insured."), and the contra-insurer rule does not apply in actions by one insurer against another, *see United States Fire Ins. Co. v. General Reins. Corp.*, 949 F.2d 569, 573-74 (2d Cir. 1991) (dispute between two insurance companies); *Loblaw, Inc. v. Employers' Liability Assurance Corp.*, 85 A.D.2d 880, 881, 446 N.Y.S.2d 743, 745 (4th Dep't 1981) (dispute between self-insured entity and excess insurer), *aff'd*, 57 N.Y.2d 872, 456 N.Y.S.2d 40, 442 N.E.2d 438 (1982).[6]

B. The District Court's Finding of Practical Construction

After concluding that in the absence of a definition of the term "occurrence," the deductible provision was ambiguous as applied to this case, the district court based its interpretation of the deductible provision on extrinsic evidence of the parties' practical construction. Because the bankruptcy court's finding that Prudential had failed to acquiesce in American Club's practice

[6] The unifying principle employed in the dissent as to both the deductible and pay first issues is that the P&I contract issued by American Club must be construed to maximize the rights of Prudential as the policyholder. First, that principle (whatever its effect might otherwise arguably be) is not implicated here, because (among other reasons) Prudential (i) is one of a handful of American Club's membership companies, (ii) holds an appreciable interest in it, (iii) is represented on its board of directors, and (iv) has actively guided many of its fortunes and policies. Second, the *contra proferentem* principle, which by nature is applicable as a last resort, does not come into play in this case because the conduct of the parties, and other interpretive guides, allow us to ascertain the parties' intended meaning of the contract.

was a finding of fact, it could be rejected only if clearly erroneous. *See In re Prudential Lines, Inc.*, 928 F.2d 565, 569 (2d Cir. 1991).

In rejecting the finding, the district court focused on two facts: (i) Prudential's failure to object to American Club's practice while Prudential was a member of American Club's board of directors; and (ii) Prudential's acceptance of the Club's reimbursement of the Graham claim, which applied multiple deductibles.[7] *Prudential IV*, 209 B.R. at 626.

Under New York law, "if ambiguity exists, to show a practicable construction . . . there must have been conduct by the one party expressly or inferentially claiming as of right under the doubtful provision, coupled with knowledge thereof and acquiescence therein, express or implied, by the other." *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 651, 593 N.Y.S.2d 966, 971, 609 N.E.2d 506 (1993) (internal quotation marks and citation omitted). Neither of the facts cited by the district court

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[7] The district court described the Graham claim as follows:

> On the Graham claim, [Prudential] paid out $50,000 and, in late 1983 and early 1984, presented a claim for reimbursement to American Club. This time, more than one policy year was involved; there were twelve (12) (1952-1963). The Club applied a deductible for each policy year. The deductibles totalled $49,000. Accordingly, the Club paid [Prudential] $1,000 plus legal expenses of $2,463.65. So far as American Club's records reveal, [Prudential] accepted that payment without protest.

Prudential IV, 209 B.R. at 625.

compels a finding that Prudential acquiesced in American Club's practice as a matter of law, and therefore the bankruptcy court's finding was not clear error.

As to Prudential's failure to object to the policy during American Club's board meetings, the question of the proper deductible was not discussed by the board until after Prudential left the club in 1986. Up to that time, Prudential submitted very few asbestos claims, and when it did claim indemnification for asbestos loss, it applied a single deductible for each claim, not American Club's practice of applying one deductible for each triggered policy. As Thomas McGowan, American Club's secretary, noted in a September 16, 1987 memorandum to the Board of Directors relating to the deductible practice: "Clearly the past [asbestos-related] settlements are insignificant either from the members' or the Association's point of view." Under the district court's analysis, Prudential would be considered to have acquiesced in all American Club practices, even those never discussed by the board; this is implausible. It was not clear error for the bankruptcy court as the trier of fact to infer that Prudential's silence at board meetings did not amount to acquiescence in American Club's deductible policy.

As to Prudential's failure to sue American Club over the Graham claim, the district court relied on *Continental Casualty*, but the case law relied on in *Continental Casualty* seems to suggest that finding a practical construction ordinarily requires the implementation of the supposed practice on more than one occasion. *See, e.g., City*

of New York v. New York City Ry. Co., 193 N.Y. 543, 548, 86 N.E. 565 (1908) ("When the parties to a contract of doubtful meaning, guided by self-interest, enforce it *for a long time* by a consistent and uniform course of conduct, so as to give it a practical meaning, the courts will treat it as having that meaning, even if as an original proposition they might have given it a different one.") (emphasis added); *see also Miller v. Clary*, 127 N.Y.S. 897, 901-02 (Sup. Ct. Seneca County) (finding practical construction from practice and acquiescence over 17 years), *aff'd*, 147 A.D. 255, 131 N.Y.S. 1129 (4th Dep't 1911), *aff'd as modified*, 210 N.Y. 127, 103 N.E. 1114 (1913); *Restatement (Second) of Contracts* § 202(4) (1979) ("Where an agreement involves *repeated occasions* for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.") (emphasis added); *id.* cmt. g. ("The rule of Subsection (4) does not apply to action on a single occasion."). It thus was not clear error for the bankruptcy court to conclude that Prudential had not acquiesced in American Club's deductible practice.

C. The Intent of the Parties

Notwithstanding our disagreement with the district court's analysis on the factual issue of practical construction, we think that the parties to the American Club policies at issue intended to apply the interpretation advanced by American Club in this litigation, *i.e.*, to treat each ini-

tial exposure by a Claimant to asbestos during a policy period as a separate occurrence. That conclusion is based on: (i) the wording of the policies, (ii) the contracting parties' actions prior to the commencement of litigation, and (iii) New York law on the interpretation of the word "occurrence."

First, we are not convinced that the deductible provision is ambiguous. Claimants' proposed interpretation is inconsistent with the plain and ordinary meaning of the term "occurrence." In *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127 (2d Cir. 1986), we noted that "the term 'occurrence' ordinarily is understood to denote 'something that takes place,' especially 'something that happens unexpectedly and without design.'" *Id.* at 135 (quoting *Webster's Third New International Dictionary* 1561 (unabridged ed. 1981)). The presence of asbestos aboard a vessel cannot be said to take place, any more than in a slip and fall aboard ship the slippery deck can be said to be happening. The presence of asbestos aboard a ship is a condition that from the point of view of the ship, is in some respects a benefit. The unfortunate event causing personal injury is the exposure of people. The Claimants' construction of the term "occurrence" therefore contradicts the ordinary meaning of the word.

Second, even if we were to conclude that the deductible provision is ambiguous, we would still find that the parties to the policy intended American Club's interpretation. Although the evidence cited by the district court does not compel a finding that Prudential acquiesced in American Club's interpretation, it does show something

about Prudential's reasonable expectations and intentions under the policy. "The New York courts have frequently resorted to the conduct of the parties in determining a contract's meaning, and insurance contracts are no exception to this practice." *See American Home Prods. Corp.*, 565 F. Supp. at 1503. The district court notes with force that no party to the American Club policy (at least prior to this litigation) has ever proposed the Claimants' interpretation of the term "occurrence," *i.e.*, a single deductible for all asbestos-related bodily injuries aboard a particular ship. The record evidence reflects that American Club has sought to apply one deductible, per claim, per policy, while Prudential and Farrell Lines, two Club members, interpreted the policies to apply a single deductible to each claim. Thus, although the *Claimants* attempt to introduce their interpretation as one plausible reading of the policy, this cannot be said to be the expectation or intention of the contracting parties.

In dissent, Judge Lay advances spirited arguments on the doctrinal question of the definition of "occurrence" under New York law (with which we disagree, as explained below). The short answer is that although the contract language is less than clear, it has been illumined by conduct on the part of the signatories that reflects an understanding incompatible with the position urged in this case by the Claimants, who are strangers to the contract.

Third, New York law gives some guidance for ascertaining the reasonable expectations of an insured as to number of "occurrences." In *Arthur*

A. Johnson Corp. v. Indemnity Ins. Co., 7 N.Y.2d 222, 196 N.Y.S.2d 678, 164 N.E.2d 704 (1959), the New York Court of Appeals sought to define the term "accident" as it would be understood by "the ordinary man on the street or ordinary person when he purchases and pays for insurance." *Id.* at 227, 196 N.Y.S.2d at 682. The insured had constructed a temporary cinder block wall in front of each of two adjoining buildings as part of an excavation of the buildings. A rainfall of unprecedented intensity flooded the excavation beyond the capacity of the pumps, and the walls were breached within 50 minutes of each other, causing property damage within the two buildings for which the policyholder was held liable. *Id.* at 225-26, 196 N.Y.S.2d at 680-81.

The insurer claimed that the damage to the two buildings resulted from a single accident within the meaning of the policy, and that a single "per accident" limit of $50,000 applied. The Court of Appeals expressly considered and rejected two tests used by other jurisdictions in determining the number of "accidents," including the "negligent act or omission" test (a single occurrence for all injuries caused by the same negligent act or omission) and the "effects" test (one occurrence per each person or thing injured). *Id.* at 227-28, 196 N.Y.S.2d at 682-83. Instead, the court applied the "unfortunate event" test, holding that "the term [accident] is to be used in its common sense of an event of an unfortunate character that takes place without one's foresight or expectation . . . . an unexpected, unfortunate occurrence." *Id.* at 228, 196 N.Y.S.2d at 683 (internal quotation marks, citation, and empha-

sis omitted). The court's examples of the application of the "unfortunate event" test are indicative: a truck colliding with a freight train and damaging the road and 16 cars was a single occurrence, while an oil well fire that lasted 50 hours and hurled waste on some neighbors but not others, depending on the direction of the wind, was a series of events (important to this conclusion was the fact that the wind was a supervening force). *Id.* at 228-29, 196 N.Y.S.2d at 683.

In finding that the collapse of the two walls in *Johnson* constituted two accidents, the court stated:

> We need only point out that it is agreed that, during a heavy rainfall, a protecting wall collapsed under the water pressure and destruction poured into a building. Almost an hour later, another wall gave way and water flooded another building. There is no suggestion that the collapse of the first wall caused the failure of the second. . . . In addition, the catastrophe was not the rain—that, in itself, did no harm. It was the breach of the wall letting the rain water in. Furthermore, if the walls were located blocks away from each other on different job sites but subject to the same rainfall, no one could contest that there were two accidents.

Id. at 230, 196 N.Y.S.2d at 684.

In *Hartford Accident & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 350 N.Y.S.2d 895, 305 N.E.2d 907 (1973), an insurance policy contained a per "occurrence" limit and left the word

"occurrence" undefined. The Court of Appeals found no difference between the meaning of the words "accident" and "occurrence," and therefore used the "unfortunate event" test to conclude that a three-car accident amounted to a single "occurrence": "Unlike *Johnson* in which there was a 50-minute elapsed interval between the collapse of the first and the second cellar walls, the two collisions here occurred but an instant apart. The continuum between the two impacts was unbroken, with no intervening agent or operative factor." *Id.* at 174, 350 N.Y.S.2d at 899.

We have expressed the rule of these cases as follows:

> In determining the number of occurrences for deductible purposes, New York inquires whether multiple claims result from 'an *event* of an unfortunate character that takes place without one's foresight or expectation.' . . . Although a single 'occurrence' may give rise to multiple claims, *courts should look to the event for which the insured is held liable, not some point further back in the causal chain.*

Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178, 1213 (2d Cir. 1995) (quoting *Arthur A. Johnson Corp.*, 7 N.Y.2d at 228, 196 N.Y.S.2d at 683) (emphasis added), *modified on denial of reh'g*, 85 F.3d 49 (2d Cir. 1996). In *Stonewall*, an asbestos manufacturer faced multiple asbestos-related property damage claims resulting from the installation of its asbestos product in many different buildings. The policy wording defined "occurrence" as "an accident, including continuous or repeated exposure

to conditions, which results in bodily injury or property damage, neither expected nor intended from the standpoint of the insured." *Id.* (internal quotation marks omitted). Drawing upon New York cases that had construed the word "occurrence" without the benefit of a policy definition, we rejected the insured's argument that all of the claims resulted from a single occurrence, *i.e.*, the manufacturer's decision to manufacture and sell asbestos-containing products. Instead, we held that the installation of asbestos in each building was a separate occurrence because "each installation created exposure to 'a condition which resulted in property damage neither expected nor intended from the standpoint of the insured,' and for each installation, there was a new exposure and another occurrence." *Id.*

Stonewall distinguished *Champion Int'l Corp. v. Continental Cas. Co.*, 546 F.2d 502 (2d Cir. 1976), in which we held that claims based on the installation of defective vinyl panels in more than a thousand vehicles arose from a single occurrence, *i.e.*, the insured's delivery of the panels to the manufacturers of the vehicles. *Id.* at 506. *Stonewall* explained that the insured in *Champion* was the wholesaler of the defective product rather than the manufacturer, that the wholesaler was liable upon delivery of the defective product, and therefore that the proper focus was on the sale or delivery rather than the installation of the defective product:

> In *Champion*, the insured was exposed to liability merely because it had delivered the defective product; in this case, by contrast,

> [the insured's] liability, as reflected in the underlying complaints, results not from its delivery of asbestos-containing products, but rather from its manufacture of those products, resulting in the presence of [asbestos-containing materials] each time the products were installed on the property of third parties. Consequently, each location at which [the insured's] products are present, reflecting a separate installation of those products, is the site of a separate occurrence requiring imposition of another deductible.

Stonewall, 73 F.3d at 1214.

Under New York law, multiple injuries are grouped as a single "occurrence" when they arise out of the same event of unfortunate character and occur close in time with no intervening agent. Applying this test, we conclude that all asbestos-related bodily claims against Prudential resulting from exposure to asbestos on a particular ship cannot be attributed to a single occurrence. In *Stonewall*, we found that installation of the asbestos was the final link in the causal chain leading to a manufacturer's liability for property damage. *Id.* at 1213; *see also Maryland Cas. Co. v. W.R. Grace and Co.*, 23 F.3d 617, 627 (2d Cir. 1994) (holding that installation of asbestos results in immediate property damage). Claimants seek to hold Prudential liable for *bodily injury* and the last link in the causal chain leading to Prudential's liability for bodily injury was exposure to asbestos. Each Claimant was separately exposed to asbestos at different points

in time. Therefore, the injuries arise from multiple occurrences.[8]

This conclusion is consistent with the few cases that both (i) use an approach similar to New York's in defining "occurrence" and (ii) have addressed the number of occurrences underlying multiple personal injuries from exposure to asbestos at the same location. *See, e.g., Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 698 A.2d 1167, 1210 (Md. 1997) ("There is an absolute dearth of appellate case law dealing with the meaning of 'occurrence' or 'accident' in the context of establishing policy limits in asbestos personal injury litigation."). In *Commercial Union Insurance Co.*, the insured was an insulation contractor in the business of selling and installing insulation which until the

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[8] The bankruptcy court rejected this conclusion because it determined that bodily injury occurs immediately or soon after exposure to asbestos, and prior cases had found that the term "occurrence" should be construed to mean something different than "injury." For this proposition the bankruptcy court relied heavily on *Uniroyal, Inc.*, in which the policy explicitly distinguished between occurrence and injury. *See Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1380 (E.D.N.Y. 1988) ("The policy Home sold to Uniroyal makes clear the distinction between the 'occurrence' and the 'injury.' "). American Club's policy does not make the same distinction. In addition, the proximity in time between the occurrence and the injury presented no problem in *Stonewall*, in which we found that each installation constituted an occurrence even though the injury—property damage—also occurred immediately upon installation. *See also Maryland Cas. Co.*, 23 F.3d at 627. Notwithstanding the important conceptual distinction between injury and occurrence, the two often occur actually or virtually together.

1970s contained asbestos and the policies at issue contained "per accident" or "per occurrence" policy limits. The court was therefore required to address

> whether 1) each claimant who was injured by exposure to asbestos constituted a separate "occurrence" (or "accident"), or 2) [the plaintiff's] "decision" to install asbestos-containing insulation during a policy period was itself a single "occurrence" (or "accident"), regardless of how many persons may have been injured as a result of that single "occurrence."

698 A.2d at 1210. The court followed the reasoning of Judge Brown in a California asbestos proceeding:

> The common thread running through the California cases is that an "occurrence" or "accident" is associated with the time of injury. This leads to the conclusion that the "cause" of injury which determines the number of occurrences undoubtedly refers to the immediate rather than the remote cause of injury. As the court stated in *Maples [v. Aetna Casualty and Surety Co.]*, *supra*, 83 Cal. App. 3d [641] at 647-48, 148 Cal. Rptr. 80 [(1978)], in reference to both California and out-of-state cases on the timing of "occurrences" or "accidents":
>
> This seemingly unbroken line of authority finds that the term "accident" unambiguously refers to the event causing damage, not the earlier event creating the potential for future injury . . . .

> The event causing damage in the asbestos-related bodily injury cases is exposure to asbestos fibers . . . . Since each individual claimant has a unique work history, each claimant's exposure must be viewed as a separate occurrence.

698 A.2d at 1211 (quoting *Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072, Statement of Decision Concerning Phase IV Issues*, at 9-16 (Super. Ct. San Fran. Jan. 24, 1990), *aff'd in part and reversed in part on other grounds sub nom. Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 20 Cal. App. 4th 296, 26 Cal. Rptr. 2d 35 (Ct. App. 1993)); *see also Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co.*, 53 F.3d 762, 767-68 (6th Cir. 1995) (holding that policy defining "occurrence" as "any happening or series of happenings, arising out of . . . one event" meant that each claimant's exposure to asbestos was a separate occurrence; rejecting insured's contention that decision to use asbestos in boilers was the single occurrence), *cert. denied*, 516 U.S. 1140, 133 L. Ed. 2d 893, 116 S. Ct. 973 (1996).[9]

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[9] A decision to the contrary is *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515 (D.D.C. 1984), in which the court found that personal injury claims against the manufacturer of an asbestos-containing product arose from a single occurrence, *i.e.*, the decision to manufacture and sell the product. *Id.* at 1525-27. That case is inapposite because its analysis differs from New York's "unfortunate event" test (*i.e.*, *Owens-Illinois*, relying on policy language, looked for a unifying event in the causal chain) and because American Club's policy does not contain the arguably unifying language that appears in the *Owens-Illinois* policy. *See*

It might be argued that if exposure is the occurrence, each period of exposure of each Claimant (or even each breath) is a separate occurrence. American Club does not make this argument and therefore does not seek to apply multiple deductibles to each Claimant in each policy period. In any event, liability attaches following the first exposure; each Claimant's first exposure in the policy period is the final unfortunate event which causes injury, gives rise to the policyholder's potential liability, and triggers the policy; the Claimant's later exposures are a continuation of the same occurrence.[10]

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also Stonewall, 73 F.3d at 1213 (characterizing *Owens-Illinois* as an attempt to "maximize[ ] coverage").

> It is worth noting that most Comprehensive General Liability ("CGL") policies contain the same clause as in *Owens-Illinois*, under which "all personal injury . . . arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." Our reading of the American Club policies (which contain no such clause) may have limited application to asbestos personal injury cases involving CGL policies.

[10] The dissent would construe the contract to maximize coverage on the theory that in cases involving "ongoing exposure by several claimants to a hazardous condition, some event other than the exposure should be the occurrence in order to avoid the injustice where a single condition causes hundreds of thousands of injuries constituting hundreds of thousands of occurrences." Dissent at [page 6-7]. Earlier, the dissent warns that, if Prudential owes 5,000 deductibles, one for each Claimant, "the practical result is that American Club will owe little or no coverage." Dissent at [page 1 n.1]. Elsewhere, the dissent predicts a "total forfeiture and a windfall to the American Club." Dissent at [page 13].

(*footnote continued*)

We hold that each claim arose from a separate occurrence, and a single deductible is applicable to each claim.

III. THE ALLOCATION ISSUE

Prudential claims the contract right to designate any single policy to indemnify Prudential in full for any insurance claim arising out of injury that spans two or more policy periods. American Club argues that payment of each insurance claim should be allocated in the first instance among all triggered American Club policies (as opposed to such allocation as the Club and its members may accomplish through contribution or internal accounting).[11] We conclude that the policy does not demonstrate a clear intent to allocate a policyholder's claim among policies in the first instance and that no contract or equitable consideration militates in favor of such allocation

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With all respect, this is grossly overdrawn. And while the dissent's interpretation would increase the insurance yield under the particular policies at issue here, the insurance yield would decrease under that interpretation when claims arising out of a single continuous occurrence are presented under policies with low per occurrence limits but high (or no) aggregate limits. In any event, the dissent's analysis amounts to reasoning from result.

[11] American Club asserts that the district court misunderstood it to argue that the losses should be allocated among all policies covering ships on which a Claimant was exposed to asbestos (even ships owned by other shipping lines), rather than only triggered policies covering Prudential ships. Whether or not such a misunderstanding occurred below, on appeal American Club only seeks to allocate liability among triggered policies covering Prudential ships.

under the circumstances of this case. The chief effect of such allocation in this case would be a multiplication of the deductibles applicable to each claim. We conclude that Prudential is within its contract rights to designate one policy to pay all of any claim covered by that policy subject of course to exhaustion of the policy limits.

American Club argues that two provisions of the policy compel allocation: (i) the indemnification clause, and (ii) the other insurance clause.

A. The Indemnification Clause

Each American Club policy covers a one-year period and provides that the Club will indemnify Prudential as

> the Assured against any loss, damage or expense which the Assured shall become liable to pay and shall pay by reason of the fact that the Assured is the owner . . . of the insured vessel and which shall result from the following liabilities, risks, events, occurrences and expenditures: . . . Liability for . . . loss of life, or personal injury to, or illness of any person . . . .

Applying New York law, the bankruptcy court held that "injury-in-fact during the policy period triggers coverage." *Prudential I*, 148 B.R. at 742. Thus, each policy provides coverage for all losses or damages for which Prudential is held liable resulting from injury occurring during the policy period.

In the context of asbestos-related injuries, the bankruptcy court found that "injury-in-fact in the form of tissue damage occurs simultaneously or

soon after asbestos inhalation." *Id.* (citing *Insurance Co. of N.A. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1222 (6th Cir. 1980), *clarified and aff'd on rehearing*, 657 F.2d 814 (6th Cir. 1981)). The court reasoned that "if a seaman were exposed to asbestos on more than one ship during any of the ships' insurance years, then more than one P & I policy would be triggered for that individual claimant." 148 B.R. at 743. The net effect of these findings—unchallenged on this appeal—is that multiple policies will likely be triggered on many of the asbestos-related claims. The question, then, is whether each policy is liable for the entirety of each claim or whether each policy is responsible for paying only the portion of the claim somehow attributable to the amount of injury during the policy period.

The answer is, it depends. When exposure, and therefore the cumulative injury, spans several policies, the harms resulting from exposure to asbestos cannot easily be assigned to a particular policy. *See J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502, 508 (Pa. 1993) ("To apportion liability among the insurers on a strictly temporal basis in direct proportion to the length of time each insurer was on the risk, however, notwithstanding its surface attractiveness, assumes a linearity of disease progression which this record does not support."); Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies*, 64 U. Chi. L. Rev. 257, 261 (1997) (hereinafter "*Allocating Liability*") ("Theoretically, damages that occur in different policy periods are divisible. In practice, however, the harms are cumulative with, and

thus indivisible from, harms suffered in earlier periods.").

Some courts dealing with similar coverage language have concluded that any single policy designated by the policyholder owes full coverage. In *Keene Corp. v. Insurance Co. of N. Am.*, 215 U.S. App. D.C. 156, 667 F.2d 1034 (D.C. Cir. 1981), the court held that each triggered policy was jointly and severally liable for the insured's liability:

> Each policy has a built-in trigger of coverage. Once triggered, each policy covers Keene's liability. There is nothing in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period. As we interpret the policies, they cover Keene's entire liability once they are triggered.

667 F.2d at 1048. Under this approach, (i) the insured selects a single policy from which to seek indemnification, (ii) that insurer pays the claim, and (iii) then the insurer seeks contribution from other liable insurers under the "other insurance" provisions of the policies or under the common law doctrine of contribution. *Id.* at 1049-50 & n.35; *see also ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 974 (3d Cir. 1985); *J.H. France Refractories Co.*, 626 A.2d at 509.

This approach has its shortcomings. One commentator has noted that "shoehorning all damages into one policy period is 'intuitively suspect' and inconsistent with the development of toxic tort jurisprudence. An insured purchases an insurance policy to indemnify it against injuries

occurring within the policy period, not injuries occurring outside that period." *Allocating Liability*, *supra*, at 270; *see Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 650 A.2d 974, 989 (N.J. 1994). And adoption of the injury-in-fact trigger approach in these asbestos cases means that the cumulative injuries are attributable to multiple policies.

Some courts have adopted an approach which allocates liability among triggered policies based upon some seemingly objective factor, such as proportion of exposure occurring during the policy period, or time on the risk.[12] For example, in *Owens-Illinois*, after finding that the policy language was no help, the court allocated liability among policies based on "both the time on the

[12] We have never addressed the allocation issue directly. In *Stonewall Insurance Co.*, the district court ruled that "each triggered policy was responsible for only a pro rata share of [the manufacturer's] liability as to a particular claimant," and this ruling was not challenged on appeal. *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1202 (2d Cir. 1995), *modified on denial of reh'g*, 85 F.3d 49 (2d Cir. 1996). We therefore had no occasion to pass on the general issue of whether allocation among multiple triggered policies is required or permitted. However, the insured in *Stonewall* did challenge the allocation of liability to itself during years when it was uninsured—what has been labelled "proration-to-the-insured." We held that the district court did not err in allocating liability to the insured under this allocation formula for periods in which the insured lacked coverage (at least during the period when coverage for asbestos risk was available), noting that " 'proration-to-the-insured' is a sensible way to adjust the competing contentions of the parties in the context of continuous triggering of multiple policies over an extended span of years." *Id.* at 1203.

risk and the degree of risk assumed," 650 A.2d at 995, because it viewed such allocation as the most efficient and fair way to allocate losses, *id.* at 992-93. Further, it required the insured to bear its share of losses for periods when it was self-insured, noting: "When periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable." *Id.* at 995; *see also Gulf Chemical & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 372 (5th Cir. 1993) (apportioning defense costs among periods of insurance and self-insurance); *Forty-Eight Insulations*, 633 F.2d at 1224-25 (endorsing pro rata allocation of defense costs to the insured for its fair share); *Uniroyal*, 707 F. Supp. at 1391 (allocating loss "to each policy according to the proportion of injuries triggering that policy").[13]

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[13] American Club argues that allocation of loss among policies is a corollary of the injury-in-fact trigger. We are unconvinced. Courts that employ an exposure trigger (which works much like injury-in-fact in this case) may also allocate among policies as a reasonable and fair approach, but they do not treat allocation as a corollary of the exposure trigger, mandated by the same medical or scientific assumptions. *See, e.g., Clemtex, Inc. v. Southeastern Fidelity Ins. Co.*, 807 F.2d 1271, 1276 (5th Cir. 1987) ("The *Forty-Eight* court's analysis, it seems safe to say, equates the full course of a victim's exposure (and virtually simultaneous tissue damage) with continuous bodily injury."); *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985) ("We believe that the exposure theory is more accurately analyzed as positing not that each inhalation of asbestos fiber results in bodily injury, but rather that every asbestos-related injury results from inhalation of asbestos fibers.").

Both approaches allow allocation among policies at some transactional point, *i.e.*, either when the loss is paid, or when it becomes the subject of contribution among policies and insurers. The courts that have endorsed allocation when the loss is paid have generally been motivated by considerations of equity and policy, rather than contract wording. First, these courts have sought to ensure that a single insurer underwriting a small proportion of the risk does not get saddled with the full loss, *see Uniroyal*, 707 F. Supp. at 1392; *Owens-Illinois*, 650 A.2d at 992-93, a loss that may prove uncollectible from other companies. Second, courts enforce allocation to require the insured to absorb losses for periods when it was self-insured. As the New Jersey Supreme Court noted, "The real difference between *Keene* and *Forty-Eight Insulations* is in their treatment of periods of self-insurance." *Owens-Illinois*, 650 A.2d at 989. Third, these courts see allocation as the most efficient way to assign liability among policies, reasoning that any contribution proceeding will involve many of the same issues that are raised in the initial liability proceeding, and that it is more efficient to deal with these issues in a single proceeding. *See LaFarge Corp. v. National Union Fire Ins. Co.*, 935 F. Supp. 675, 688 (D. Md. 1996) ("An equitable apportionment scheme should lessen or obviate the need for subsequent rounds of litigation. . . . Second and third rounds of litigation can be expected to result in substantial additional litigation costs for the parties.").

Fortunately, a number of factors that often complicate the inquiry are absent here. Pruden-

tial had insurance coverage in each policy period implicated by the claims, and had no periods of self-insurance. In any event, no issue has been raised that a self-insured period existed, or arose by exhaustion of limits. And for virtually the entire span of years, American Club was Prudential's only insurer. In 1971-74, Prudential was insured by another club that is not a party to this litigation, though apparently there exists an understanding among the insured shipowners and P&I insurers providing for allocation of loss among themselves.[14] American Club argues that its membership varies year by year, and that allocation among the policy years is important to determine each member's liability. However,

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[14] American Club asserts that the loss should be allocated in part to the unidentified, non-party club that insured Prudential in policy years 1971-74. But Prudential's rights (if any) vis-a-vis that non-party are not before us, and the record reflects that the various clubs and their members have reached an understanding for the allocation of loss on seamen's asbestos claims:

> There is already in place among shipowners and their P&I underwriters a practice to allocate liability for asbestos claims among shipowners *pro rata* according to sea service days of the seaman's employment by each owner; if an owner had more than one underwriter for implicated policy years, a further allocation is made among underwriters, and the Club applies one deductible for each implicated policy year.

American Club's Reply Brief at 15-16 n. 3. We have no reason to believe that American Club and the club which insured Prudential from 1971 to 1974 have not reached a similar agreement, thus rendering inapplicable the policy considerations favoring allocation discussed above.

American Club may develop (and seems already to have developed) an internal allocation mechanism for claims.

The financial significance of the allocation issue in this proceeding lies in its impact on the number of deductibles that will be applied to each claim. Under American Club's pro rata allocation approach, one deductible would apply *per claim* as well as *per triggered policy*, whereas under the Claimants' approach, all losses from any single claim would be recovered under a single policy and therefore a single deductible would apply to each claim. Given: (i) the policy's broad language covering "any loss [or] damage" which Prudential becomes liable to pay resulting—presumably even in part—from injuries occurring during the policy period; (ii) the absence of a contractual intent to require allocation of liability among policies in the first instance; and (iii) the lack of any compelling policy or equitable considerations favoring allocation, we decline to read the policies in a way that would have the (probably unintended) effect of multiplying the deductibles applicable to each claim.

We hold that, in the circumstances presented, Prudential has the right to demand that a policy pay full coverage for each insurance claim in which the underlying Claimant suffered asbestos exposure and therefore asbestos injury during the policy period.

B. The Other Insurance Clause

The other insurance clause does not compel allocation of liability among triggered American Club policies in the first instance: "*The Associa-*

tion shall not be liable for any loss, damage or expense against which, but for the insurance herein provided, the Assured is or would be insured under existing insurance."

In construing this clause, we must determine the intent of the parties as expressed by the policy's words and purposes. *See American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1492 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984). The wording says that *the Association*, *i.e.*, American Club, will not be liable if there is other existing insurance that would cover the particular loss. The evident intent of this clause is to reduce American Club's liability when insurers other than American Club also insure against the same risk. This clause does not reduce liability or compel allocation in the first instance when more than one of American Club's own policies is triggered. Moreover, we will not infer from this clause an intent to allocate liability among American Club's own policies when the only consequence of such allocation would be to multiply the deductibles applicable to each claim.

Whether the other insurance clause reduces Prudential's liability for claims which are covered by Prudential's 1971-74 coverage is a different question. But it is inappropriate to resolve that issue at this stage because we do not know whether such claims exist and do not have before us the other club's policy. Moreover, cases following the approach which we adopt here have employed other insurance clauses to distribute liability in the contribution phase, not in the liability phase. *See, e.g., Keene Corp.*, 667 F.2d at

1050; *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 52 Cal. Rptr. 2d 690, 707-08 (Ct. App. 1996); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502, 509 (Pa. 1993). It may be that such an arrangement would be appropriate in this case as well.

Accordingly, we hold that the other insurance clause does not mandate allocation of liability among triggered American Club policies in the first instance. That is, Prudential may seek recovery under a single triggered policy of its choosing, and American Club presumably will allocate liability among the triggered policies as an internal accounting matter, or through claims for contribution, or not at all, as its board and internal governance provide or allow. *See, e.g.*, *Keene Corp.*, 667 F.2d at 1049-50.

CONCLUSION

To summarize: (i) the recycling arrangement created by the Stipulation and Settlement Agreement does not satisfy the pay first provision of American Club's policy; (ii) each Claimant's asbestos-related injuries arose from a separate occurrence and therefore a single deductible will be applied to each claim; and (iii) liability will not be allocated in the first instance among triggered American Club policies.

The judgment of the district court is affirmed.

LAY, *Circuit Judge*, dissenting:

I.

The majority holds that "each claim arose from a separate occurrence, and a single deductible is applicable to each claim." I must respectfully disagree. Such a construction is not supported by the law of New York. The consequence of the majority's conclusion, based upon the idea that the exposure of the claimants is an "occurrence," is that each subsequent exposure would also count as a separate occurrence. The majority recognizes this possible consequence of its logic, but avoids it by simply stating that American Steamship Owners Mutual Protection and Indemnity Association ("American Club") does not make such an argument. The majority opinion stops short of this unavoidable and unreasonable conclusion and instead concludes that the intent of the parties was that "each claimant's first exposure in the policy period is the final unfortunate event which *causes injury*. . . ."[1] In all due respect, such a construction depends solely on a fictional hypothesis.

The majority acknowledges that in *Arthur A. Johnson Corp. v. Indemnity Ins. Co.*, 7 N.Y.2d 222, 228, 164 N.E.2d 704, 707, 196 N.Y.S.2d 678, 683 (1959), the term "accident" was defined by the "unfortunate event" test. In *Hartford Acci-*

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[1] Under such reasoning, as in the Agent Orange cases, there exists in the present case more than 5,000 occurrences and the result will be that there exists 5,000 deductibles. The practical result is that American Club will owe little or no coverage.

dent & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 173, 305 N.E.2d 907, 910, 350 N.Y.S.2d 895, 899 (1973), the court of appeals used the unfortunate event test to define the term "occurrence." In these two cases, however, it was not necessary to determine whether occurrence and accident were intended to have different meanings.

In *Uniroyal*, Judge Weinstein observed that the policy at issue in the Agent Orange case read that occurrence was not identical to accident, but includes accident as well as "event," "happening," and "continuous or repeated exposure to conditions." *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368 (E.D.N.Y. 1988). Judge Weinstein then observed: "The insurance industry developed this newer 'occurrence' definition in order to provide clearly for coverage of gradual, continuous, and prolonged events that might have been excluded by the instantaneous connotation of 'accident.' " *Id.* The cases which he thereafter cites state that "occurrence provides broader coverage than 'accident.' " *Id.* (citing *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 135-36 (2d Cir. 1986)).

The policy language of the American Club provides coverage for "accident or occurrence." Although the policy language in the instant case is not identical to that construed by Judge Weinstein in *Uniroyal*, it is similarly fundamental that the two terms in the policy at issue were not intended to mean the same thing because they are set forth in the disjunctive. In any event, relying on the definition in *Webster's Third New Int'l Dictionary* 1561 (unabridged ed. 1981), the majority adheres to New York law and applies

the "unfortunate event" test to define an occurrence. The majority opinion, however, thereafter equates both the event and injury as the definition of occurrence. It is at this juncture I must respectfully part company.

As Judge Weinstein observed:

> Neither the *Johnson* nor the *Wesolowski* court provided any guidance, apart from the "average man" aphorism, on how to identify the "unfortunate event" or on how to distinguish among several plausible such events. All that can surely be drawn from those two cases is that the "unfortunate event" is not the "negligent act or omission" and it is not the injury to each victim. The "unfortunate event" is evidently one of the several happenings, with the exception of the negligent act or omission, which precedes and contributes to the resulting injury.

Uniroyal, 707 F. Supp. at 1382. Judge Weinstein identified "interrelated casually contributing events" in the Agent Orange case and then goes on to say: "In this sense, the terms of the definition of 'occurrence' are partly ambiguous: they identify a set of possible occurrences, but give little assistance in selecting the proper item from that set." *Id.*

In the present case, the majority summarily dismisses the Uniroyal analysis on the ground that the policy in *Uniroyal* specifically provided that the occurrence was defined not to be the injury; that the injury was stated to be the result

of the occurrence.[2] It is true that the American Club policy does not contain the same language as the *Uniroyal* policy. However, this is not fatal to the analysis. More critical to the point is the fact that the policy *does not* contain a definition that occurrence means both "the event and the injury resulting therefrom." The policy is ambiguous.

Under these circumstances one could urge that the most favorable construction of the ambiguity should be resolved in favor of the insured, Prudential Lines, Inc. ("PLI").[3] However, more importantly, because the term is not defined, a common understanding dictates that an "unfortunate event" (an occurrence) is what causes an injury and unless defined to the contrary, com-

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[2] Judge Weinstein stated "if the policy had defined the occurrence to be both the 'event and the injury resulting therefrom,'" the result might have been different. *Id.* at 1380.

[3] In regard to the question of applying *contra proferentum* in the context of this case, I fail to see that PLI is not the insured in its relationship to the American Club simply because it also shares in a system of mutual insurance. PLI is not an insurance company and it does not act as a self-insurer as the insured did in *Loblaw, Inc. v. Employers' Liab. Assurance Corp.*, 85 A.D.2d 880, 446 N.Y.S.2d 743 (N.Y. App. Div. 1981), *aff'd*, 57 N.Y.2d 872, 442 N.E.2d 438, 456 N.Y.S.2d 40 (1982), the case cited by the majority. In its relationship with American Club its status is not "more akin to that of an insurance company than to that of an individual who is inexperienced in matters of insurance coverage for whose benefit the rule was promulgated." *Id.* at 881, 446 N.Y.S.2d at 745. Furthermore, PLI's mutual association with other steamship lines is irrelevant to the relationship of American who has insured PLI.

mon principles of cause and effect should govern a basic understanding. The court in *Uniroyal* quotes from the Sixth Circuit case of *Michigan Chem. Corp. v. American Home Assurance Co.*, 728 F.2d 374 (6th Cir. 1984), to illustrate this view:

> The vast majority of courts . . . have concluded that although injury must be suffered before an insured can be held liable, the number of occurrences for purposes of applying coverage limitations is determined by reference to the cause or causes of the damage and not to the number of injuries or claims. The number and timing of injuries is relevant in addressing the distinct question of the policy period to which each injury will be assigned.
>
> The definitions of "occurrence" in the present insurance policies reflect this approach. . . . The language makes the [event] constituting the occurrence logically distinct from the injuries which later take place. . . . We hold that . . . the policy terms admit of only one reasonable interpretation.

Michigan Chemical, 728 F.2d at 379.[4]

Under the majority's approach, the policy is triggered at the time of the injury (the exposure

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[4] I fully recognize *American Home* can be distinguished on the basis that its policy terms state that the occurrence is distinct from the injury. However, once again the American Club policy does not contradict these terms or expressly provide to the contrary. Because of such ambiguity, at the very least, the doctrine of reasonable expectation of the insured should apply.

of a claimant) which is likewise construed to mean the occurrence. In common parlance, however, it is only logical that an event is separate from the damage it causes. The policy language in *Uniroyal* is nothing more than a re-statement of the common understanding of the relationship between "occurrence" and "injury." If one slips and falls on a slippery floor, injury may or may not happen. A person may fall and not discover until months later that a herniated disc was caused by the fall. The occurrence was not the injury but the fall. Similarly, one can be exposed to asbestos and not be harmed. Twenty years ago the federal government ordered that all asbestos insulation be removed from all federal buildings. The repeated exposure of government workers from the time of installation to the time of removal did not result in reported injuries. To urge that the unfortunate event is the initial exposure (injury) of the claimant to the asbestos adopts nothing more than a fictional analysis which will deprive, at least in the present case, thousands of injured claimants of their lawful damages under the policy.

The occurrence and the injury it produces need not have any relationship to each other in time or place. The time of the occurrence producing the ultimate injury is irrelevant to triggering the policy. The majority's argument that it is the immediate event (the exposure) rather than the remote cause of injury (the presence) merely states a principal of causation (proximate cause) which is intended to avoid but-for reasoning. But the immediate event created by PLI in this case is not a multiple accident but a continuous con-

dition which ultimately could and did result in bodily injury to over 8,000 seamen. The individual exposures were not caused by the steamship line. They occurred through the acts of the seamen. The installation and presence of the asbestos on the ships, as the place of employment, was the last immediate and unfortunate event brought about by the PLI. The present case begs for the adoption of Judge Weinstein's reasoning in *Uniroyal*. Where there is an ongoing exposure by several claimants to a hazardous condition, some event other than the exposure should be the occurrence in order to avoid the injustice where a single condition causes hundreds of thousands of injuries constituting hundreds of thousands of occurrences.

In the present case, just as in *Uniroyal*, there are multiple events to choose from to define the occurrence. It could be the purchase of the asbestos by PLI, the overall presence of the asbestos on each ship, the overall presence of the asbestos on all ships, the initial exposure by each claimant, or the overall multiple exposure by each claimant. The latter two events equate the injury with the occurrence and should be rejected. Because the allocation of each policy per policy year requires a new deductible, it is only logical that the overall installation and presence on all ships should constitute a single occurrence.

In *Uniroyal*, Judge Weinstein recognized that finding a single continuous occurrence is especially appropriate in cases involving mass deliveries of hazardous products that impose damage on large numbers of people. *Uniroyal*, 707 F. Supp. at 1384. Similarly, in *Champion Int'l Corp.*

v. Continental Cas. Co., 546 F.2d 502 (2d Cir. 1976), the Second Circuit found that 1,400 installations of defective paneling constituted only one continuous and repeated occurrence. Although the *Stonewall* decision cited by the majority distinguishes *Champion*'s single occurrence choice, *Stonewall* did hold that the installation of asbestos was the proper occurrence because it caused the asbestos exposure. *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1212-1213 (2d Cir. 1995), *modified on denial of reh'g*, 85 F.3d 49 (2d Cir. 1996). The Second Circuit in *Stonewall* and the majority reject *Champion*'s analysis because Champion was the distributor of the defective product, whereas, Stonewall was the manufacturer and installer of the asbestos. Here, however, PLI was simply the provider of a place of employment where the asbestos was installed. PLI was not the manufacturer or the installer. In addition, *Stonewall* related to damage to property; property damage lies in a totally different context from bodily injury incurred by the individual claimants.

In this case, however, applying the doctrine of most favorable construction for the insured makes the overall installation and presence the likely choice in the face of ambiguous policy language. Beyond this, it would seem that the common understanding, in the terms of the "average business man," supports this rule. Furthermore, this approach is more equitable and manageable. There is nothing in the policy or the law which contradicts it.

Such a result would certainly fall within the reasonable expectations of both the insured and insurer. Furthermore, this analysis does not depend on fictional hypothesis but rather on the actual experience involved here. The occurrence in this case was the continuing presence of the asbestos and is clearly separate from the injury encountered by the claimants' exposure. In sum, common understanding of the term "occurrence" points to the underlying event rather than to the initial exposure (injury) by the worker.

II.

Plaintiffs' utilization of the $300,000 reserve fund to recycle all payments (set up and approved by the bankruptcy judge as a part of the reorganization plan) provided only a momentary loss, but it was a loss. In 1969, Judge Mansfield observed:

> The courts of New York have repeatedly held that an insured fulfills his obligations under an indemnity policy and is entitled to reimbursement when a judgment against him has been satisfied, and the insurer may not escape its obligation to indemnify by showing that the payment made by the assured was advanced to it by a third party or financed in some other fashion.

Liman v. American S.S. Owners Mut. Protection & Indem. Ass'n, 299 F. Supp. 106, 109 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 627 (2d Cir. 1969).[5]

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[5] Judicial approval of the use of a promissory note as a means of payment to satisfy the "pay first" requirement of

The majority rejects plaintiffs' plan of recycling payments to the claimants on the ground that plaintiffs' arrangement was to finance "the whole of the claims, not the deductible alone." The majority then reasons that "indemnity is sought for a *loss* that the policy holder has not incurred." (emphasis added). Thus, the majority finds that plaintiffs' non-recourse notes to the claimants is not a loss.

In all due respect, I fail to understand the proffered distinction. The payment of $300,000, the satisfaction of judgments, along with the proffer of the non-recourse notes to each claimant constitutes a loss to the estate. It has created a new obligation to pay from existing estate funds certain sums of money. For example in *Liman*, the estate was able to pay all but $1,000 to each claimant. If it had been required to pay all 147 deductibles, it would not have had sufficient funds to pay any claims. Thus, the promissory notes in *Liman* were directly related to the estate's ability to pay the various claimants. In addition in *Liman*, if all deductibles had been paid, the United States government would not have sufficient funds to protect its priority claims.

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an indemnity policy can be found in early decisions throughout the country. For example, in *Riner v. Southwestern Sur. Ins. Co.*, 85 Ore. 293, 165 P. 684 (Or. 1917), the court stated that "not only the weight of precedent, but also the weight of reason, gives support to the doctrine that the making and delivery of a note may be a loss actually sustained." 165 P. at 687 (listing cases which hold that the giving of a promissory note is a loss within the meaning of an indemnity policy).

The majority reasons that "the insured's lack of assets to satisfy claims against the bankrupt estate typically leaves the insured unable to sustain the loss and pay the claim." The result of the majority's decision is wholly inequitable; it allows a windfall to the insurer and denies any hope of payment to the injured worker. The financial plan created by *Liman* followed by the bankrupt estate mitigates this inequity and provides some partial relief.

By reducing each claim to a money judgment, the estate must obtain satisfaction of the judgment by proffering up to $300,000 to each claimant. When it has done that, the fact that the judgment creditor loans the monies back to the estate in exchange for a non-recourse note is not a sham. True, it is a contrived plan, but it was contrived in good faith with approval of the court.[6] Prudential received no benefit from the plan. The note, albeit a non-recourse note, is a

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[6] *Cf. Taxicab Motor Co. v. Pacific Coast Cas. Co. of San Francisco*, 73 Wash. 631, 132 P. 393 (Wash. 1913), in which the insured under an indemnity policy satisfied a judgment against it through the use of a promissory note. The court observed:

> It will be remembered that the terms of the proposed payment and satisfaction were made known by the administratrix to the judge sitting in probate and received his sanction and approval before the settlement was made. It seems to us that *this latter fact is alone sufficient to dispel any idea of bad faith that might arise from the transaction itself*, and sufficient to require some direct and cogent proof of bad faith before it can be held that the transaction is not what it purports to be.

132 P. at 395 (emphasis added).

loss to the estate and can be filed in the estate as a claim against the estate, and depending upon the monies available, it will diminish the estate.[7]

Under this plan, each claimant (note holder) as a general creditor will still not be paid in full—but in this case, partial payment is better than nothing. Furthermore, what happens to the monies Prudential paid out should be of little concern to the indemnitor. There is no case that holds the plan is wrong;[8] equally, there is no case

[7] A note "has been held in numerous cases sufficient to constitute loss or damage under an indemnity against loss if that note is accepted as payment and in satisfaction of the judgment against the obligee." *Walker Mfg. Co. v. Dickerson, Inc.*, 510 F. Supp. 329, 332 (W.D.N.C. 1980) (citing *Seattle & S.F. RY. & Navigation Co. v. Maryland Cas. Co.*, 50 Wash. 44, 96 P. 509 (Wash. 1908); *Kennedy v. Fidelity & Cas. Co. of New York*, 100 Minn. 1, 110 N.W. 97 (Minn. 1907). As the *Walker* case observed these early state court decisions held that "execution of a note accepted as satisfaction for a judgment against the maker was a 'loss' sufficient to support recovery under an indemnity against loss, notwithstanding the possibility of the maker's insolvency." *Walker*, 510 F. Supp. at 332.

[8] The majority cites two cases in support of its attempt to distinguish *Liman* from the present case: *Ahmed v. American S.S. Owners Mut. Protection & Indem. Ass'n, Inc.*, 444 F. Supp. 569 (N.D. Cal. 1978), *aff'd in part, remanded in part*, 640 F.2d 993 (9th Cir. 1981); and *Conoco, Inc. v. Republic Ins. Co.*, 819 F.2d 120 (5th Cir. 1987). However, these cases are substantially different from the case before this court.

The majority cites *Ahmed* for the proposition that it distinguishes *Liman* because the insured in *Ahmed* "never paid any of the claims against it or arranged to finance such payments." *Ahmed*, 444 F. Supp. at 572. *Ahmed* involved an attempt by an injured third party to maintain a *direct action* against a marine indemnity insurer after the insured shipping company became insolvent. The court held that New

that holds on all fours that it is right. But the proposed plan is within the spirit of the law

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York law does not allow for such direct actions in the marine indemnity context. *Ahmed*, 444 F. Supp. at 572. It is obvious that when an injured third party attempts to directly sue the indemnity insurer that the insured will not have "paid any of the claims against it or arranged to finance such payments."

See id. However, in the present case, the insured did "arrange to finance such payments" through the recycling agreement and did in fact "pay the claims against it." Therefore, the facts of the present case are not so easily distinguished from *Liman* as they are in the *Ahmed* decision.

The majority also cites *Conoco* in support of its proposition that the present case and *Liman* are distinguishable. In *Conoco*, an insolvent insured executed a demand promissory note, two years after its insolvency, in favor of the injured party claiming that the note was payment under the marine indemnity policy. *Conoco*, 819 F.2d at 121. The court held that the execution of the promissory note by the insured was not an actual expense and did not trigger the indemnity policy. *Id.* at 122-23. The facts of *Conoco*, however, are significantly different from the facts of the present case.

First, in *Conoco*, the injured party informed the insured that it would not attempt to collect on the promissory note. *Id.* at 121. There was no such assurance made by the claimants in this case. Second, the *Conoco* decision was supported by and decided under Texas law, not New York law. *Id.* at 123. Third, in *Conoco*, the insured was "completely bereft of assets" and "literally incapable of sustaining a loss." *Id.* at 122. The insured corporation was also dissolved. This is not true here. In addition, the insured in *Conoco* "offered no hope of eventually providing *any value at all* in exchange for the note." *Id.* at 123 (emphasis added). While Prudential may not have the assets to completely pay the full amount of claimants' judgments, Prudential does have some assets (as evidenced by the $300,000 used in the recycling agreement) and is capable of sustaining a loss. Prudential does offer hope of providing some value for the non-recourse notes.

(finding a remedy for the right) and does not result in total forfeiture and a windfall to the American Club.

EXHIBIT A

Assessable–1963

Policy No. A-5191

AMERICAN STEAMSHIP OWNERS
MUTUAL PROTECTION AND
INDEMNITY ASSOCIATION, INC.

New York, N.Y.

(Herein called the Association)

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED

and of AS PER SCHEDULE ATTACHED

Dollars being Premium at the rate of

AS PER SCHEDULE ATTACHED

per gross registered ton

DOES INSURE AS PER ENDORSEMENTS ATTACHED

, Policyholder,

and

, Additional Assured

(Herein called collectively the Assured)

who in accepting this policy agree that the party described above as "Policyholder" shall exclu-

sively be entitled to the rights of a policyholder and member as set forth in the charter and by-laws of the Association:

LOSS, IF ANY, PAYABLE TO
AS PER ENDORSEMENTS ATTACHED

IN THE INSURED SUM OF AS PER ENDORSEMENT ATTACHED DOLLARS at and from the 20 day of FEBRUARY 1981 at NOON, GREENWICH MEAN time until the 20 day of FEBRUARY 1982 at NOON, GREENWICH MEAN time against the risks and subject to the terms and conditions hereunder set forth in respect of the vessel called the AS PER SCHEDULE ATTACHED of gross registered tons or by whatsoever other names the said vessel is or shall be named or called.

ASSESSABILITY. The Assured are subject to a contingent liability hereunder for assessment without limit of amount for their proportionate share of any deficiency or impairment as provided by law and fixed in accordance with the by-laws of the Association; provided, however, that any such assessment shall be for the exclusive benefit of holders of policies which provide for such a contingent liability, and the holders of policies subject to assessment shall not be liable

to assessment in an amount greater in proportion to the total deficiency than the ratio that the deficiency attributable to the assessable business bears to the total deficiency.

THE ASSOCIATION AGREES TO INDEMNIFY THE ASSURED AGAINST ANY LOSS, DAMAGE OR EXPENSE WHICH THE ASSURED SHALL BECOME LIABLE TO PAY AND SHALL PAY BY REASON OF THE FACT THAT THE ASSURED IS THE OWNER (OR OPERATOR, MANAGER, CHARTERER, MORTGAGEE TRUSTEE, RECEIVER OR AGENT, AS THE CASE MAY BE) OF THE INSURED VESSEL AND WHICH SHALL RESULT FROM THE FOLLOWING LIABILITIES, RISKS, EVENTS, OCCURRENCES AND EXPENDITURES:

. . .

LOSS OF LIFE, INJURY AND ILLNESS.

(1) LIABILITY FOR LIFE SALVAGE, LOSS OF LIFE, OR PERSONAL INJURY TO, OR ILLNESS OF ANY PERSON, NOT INCLUDING, HOWEVER, UNLESS OTHERWISE AGREED BY ENDORSEMENT HEREON, LIABILITY TO AN EMPLOYEE (OTHER THAN HEREAFTER EXCEPTED) OF THE ASSURED, OR IN THE CASE OF HIS DEATH TO HIS BENEFICIARIES, UNDER ANY COMPENSATION ACT, LIABILITY HEREUNDER WITH RESPECT TO A MEMBER OF THE CREW SHALL INCLUDE LIABILITY ARISING ASHORE OR AFLOAT, LIABILITY HEREUNDER SHALL

ALSO INCLUDE BURIAL EXPENSES NOT EXCEEDING $500., WHERE REASONABLY INCURRED BY THE ASSURED FOR THE BURIAL OF ANY SEAMAN.

(a) Liability hereunder shall include the liability of the Assured for claims under any Compensation Act (other than hereafter excepted), in respect of an employee (i) who is a member of the crew of the insured vessel, or (ii) who is on board the insured vessel with the intention of becoming a member of her crew, or (iii) who, in the event of the vessel being laid up and out of commission, is engaged in the upkeep, maintenance or watching of the insured vessel, or (iv) who is engaged by the insured vessel or its Master to perform stevedoring work in connection with the vessel's cargo or ports in Alaska and ports outside the Continental United States where contract stevedores are not readily available. This insurance, however, shall not be considered as a qualification under any Compensation Act, but, without diminishing in any way the liability of the Association under this policy, the Assured may have in effect policies covering such liabilities. All claims under such Compensation Acts for which the Association is liable under the terms of this policy are to be paid without regard to such other policies.

(b) Liability hereunder shall not cover any liability under the provisions of the Act of Congress approved September 7th, 1916 and as amended, Public Act No. 267, Sixty-

fourth Congress, known as the U.S. Employees Compensation Act.

(c) Liability hereunder in connection with the handling of cargo for the insured vessel shall commence from the time of receipt by the Assured of the cargo on dock or wharf, or on craft alongside for loading, and shall continue until due delivery thereof from dock or wharf of discharge or until discharge for the insured vessel on to a craft alongside.

(d) Liability hereunder may, by endorsement hereon, be made payable to an employee of the Assured or in the event of his death to his beneficiaries or estate.

(e) Claims hereunder, other than for burial expenses, are subject to a deduction of $ with respect to each accident or occurrence.

REPATRIATION EXPENSES.

(2) LIABILITY FOR EXPENSES REASONABLY INCURRED IN NECESSARILY REPATRIATING ANY MEMBER OF THE CREW OR ANY OTHER PERSON EMPLOYED ON BOARD THE INSURED VESSEL; PROVIDED, HOWEVER, THAT THE ASSURED SHALL NOT BE ENTITLED TO RECOVER ANY SUCH EXPENSES INCURRED BY REASON OF THE EXPIRATION OF THE SHIPPING AGREEMENT, OTHER THAN BY SEA PERILS, OR BY THE VOLUNTARY TER-

MINATION OF THE AGREEMENT, WAGES SHALL BE RECOVERABLE HEREUNDER ONLY WHEN PAYABLE UNDER STATUTORY OBLIGATION DURING UNEMPLOYMENT DUE THE WRECK OR LOSS OF THE INSURED VESSEL.

(a) Claims hereunder are subject to a deduction of $ with respect to each accident or occurrence.

COLLISION.

(3) LIABILITY FOR LOSS OR DAMAGE ARISING FROM COLLISION OF THE INSURED VESSEL WITH ANOTHER SHIP OR VESSEL WHERE THE LIABILITY IS OF A TYPE, CHARACTER, OR KIND WHICH WOULD NOT BE COVERED IN ANY RESPECT BY THE FOLLOWING PORTIONS OF THE FOUR-FOURTHS COLLISION CLAUSE IN THE AMERICAN INSTITUTE HULL CLAUSES (JUNE, 2, 1977) FORM.

"And it is further agreed that:

(a) if the Vessel shall come into collision with any other ship or vessel, and the Assured or the Surety in consequence of the Vessel being at fault shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the Underwriters will pay the Assured or the Surety, whichever shall have paid, such proportion

of such sum or sums so paid as their respective subscriptions hereto bear to the Agreed Value, provided always that their liability in respect to any one such collision shall not exceed their proportionate part of the Agreed Value:

(b) in cases where, with the consent in writing of a majority (in amount) of Hull Underwriters, the liability of the Vessel has been contested, or proceedings have been taken to limit liability, the Underwriters will also pay a like proportion of the costs which the Assured shall thereby incur or be compelled to pay.

When both vessels are to blame, then, unless the liability of the owners or charterers of one or both such vessels becomes limited by law, claims under the Collision Liability clause shall be settled on the principle of Cross-Liabilities as if the owners or charterers of each vessel had been compelled to pay to the owners or charterers of the other of such vessels such one-half or other proportion of the latter's damages as may have bee properly allowed in ascertaining the balance or sum payable by or to the Assured in consequences of such collision.

The principles involved in this clause shall apply to the case where both vessels are the property, in part or in whole, of the same owners or charterers, all questions of responsibility and amount of liability as between the two vessels being left to the

decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Assured and one to be appointed by the majority (in amount) of Hull Underwriters interested: two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single Arbitrator, or of any two of such three Arbitrators, appointed as above, to be final and binding.

Provided that this clause shall in no case extend to any sum which the Assured or the Surety may become liable to pay or shall pay in consequence of, or with respect to:

(a) removal or disposal of obstructions, wrecks or their cargoes under statutory powers or otherwise pursuant to law;

(b) injury to real or personal property of every description;

(b) the discharge, spillage, emission or leakage of oil, petroleum products, chemicals or other substances of any kind or description whatsoever;

(d) cargo or other property on or the engagements of the Vessel;

(e) loss of life, personal injury or illness.

Provided further that exclusions (b) and (c) above shall not apply to injury to other vessels or property thereon except to the extent that such injury arises out of any action

taken to be avoid, minimize or remove any discharge, spillage emission or leakage described in (c) above."

PROVIDED, HOWEVER, THAT INSURANCE HEREUNDER SHALL NOT EXTEND TO ANY LIABILITY, WHETHER DIRECT OR INDIRECT, IN RESPECT OF THE ENGAGEMENTS OF OR THE DETENTION OR LOSS OF TIME OF THE INSURED VESSEL.

(a) Claims hereunder shall be settled on the principles of Cross-Liabilities to the same extent only as provided in the four-fourths Collision Clause mentioned.

(b) Where both vessels are the property, in part or in whole, of the same Owners or Charterers, claims hereunder shall be settled on the basis of the principles set forth in the four-fourths Collision Clause above mentioned.

(c) Claims hereunder shall be separated among and take the identity of the several classes of liability for loss, damage, and expense enumerated in this policy and each class shall be subject to the deductions, inclusions, exclusions, and special conditions applicable in respect to such class.

(d) Notwithstanding the foregoing, the Association shall not be liable for any claims hereunder where the various liabilities resulting from such collision, or any of them have been compromised, settled or adjusted

without the written consent of the Association.

DAMAGE CAUSED OTHERWISE THAN BY COLLISION.

(4) LIABILITY FOR LOSS OF OR DAMAGE TO ANY OTHER VESSEL OR CRAFT, OR TO PROPERTY ON BOARD SUCH OTHER VESSEL OR CRAFT, CAUSED OTHERWISE THAN BY COLLISION OF THE INSURED VESSEL WITH ANOTHER VESSEL OR CRAFT.

(a) Where such other vessel or craft or property on board such other vessel or craft belongs to the Assured, claims hereunder shall be adjusted as if it belonged to a third person; provided, however, that if such vessel, craft or property be injured, the Association shall be liable hereunder only in so far as the loss or damage, but for the insurance herein provided, is not or would not be recoverable by the Assured under such other insurance.

(b) Claims hereunder are subject to a deduction of $ with respect to each accident or occurrence.

DAMAGE TO DOCKS, BUOYS, ETC.

(5) LIABILITY FOR DAMAGE TO ANY DOCK, PIER, JETTY, BRIDGE, HARBOR, BREAKWATER, STRUCTURE, BEACON, BUOY, LIGHTHOUSE, CABLE, OR TO ANY FIXED OR MOVABLE OBJECT OR PROP-

ERTY WHATSOEVER, EXCEPT ANOTHER VESSEL OR CRAFT OR PROPERTY ON ANOTHER VESSEL OR CRAFT, OR TO PROPERTY ON THE INSURED VESSEL UNLESS PROPERTY ON THE INSURED VESSEL IS ELSEWHERE COVERED HEREIN.

(a) Where any such object or property belongs to the Assured, claims hereunder shall be adjusted as if it belonged to a third person; provided, however, that if such object or property be insured, the Association shall be liable hereunder only in so far as the damage, but for the insurance herein provided, is not or would not be recoverable by the Assured under such other insurance.

(b) Claims hereunder are subject to a deduction of $ with respect to each accident or occurrence.

WRECK REMOVAL.

(6) LIABILITY FOR COSTS OR EXPENSES OR INCIDENTAL TO THE REMOVAL OF THE WRECK OF THE INURED VESSEL, PROVIDED, HOWEVER THAT:

(a) From such costs and expenses shall be deducted the value of any salvage from or which might have been recovered from the wreck injuring, or which might have injured, to the benefit of the Assured;

(b) The Association shall not be liable for any costs or expenses of a type, character or

kind which would be payable under the terms of a policy written on the American Institute Hull Clauses (June 2, 1977) Form and a policy written on the American Institute Increased Value and Excess Liabilities Clauses (November 3, 1977) Form;

(c) In the event that the wreck of the insured vessel is upon property owned, leased, rented, or otherwise occupied by the Assured, the Association shall be liable for any liability for removal of the wreck which would be imposed upon the Assured by law in the absence of contract if the wreck had been upon the property belonging to another, but only for the excess over any amounts recoverable under any other insurance applicable thereto;

(d) Each claim hereunder is a deduction of $

CARGO.

(7) LIABILITY FOR LOSS OF OR DAMAGE TO OR IN CONNECTION WITH CARGO OR OTHER PROPERTY (EXCEPT MAIL OR PARCELS POST), INCLUDING BAGGAGE AND PERSONAL EFFECTS OF PASSENGERS, TO BE CARRIED, CARRIED OR WHICH HAS BEEN CARRIED ON BOARD THE INSURED VESSEL; PROVIDED, HOWEVER, THAT NO LIABILITY SHALL EXIST HEREUNDER FOR:

SPECIE, BULLION, JEWELRY, ETC.

(a) Loss, damage or expense incurred in connection with the custody, carriage or delivery of specie, bullion, precious metals, precious stones, jewelry, silks, furs, currency, bonds or other negotiable documents, or similar valuable property, unless specially agreed to and accepted for transportation under a form of contract approved, in writing, by the Association;

REFRIGERATION.

(b) Loss, damage or expense arising out of or in connection with the care, custody, carriage or delivery of cargo requiring refrigeration, unless the spaces, apparatus and means used for the care, custody and carriage thereof have been surveyed by a classification or other competent disinterested surveyor under working conditions before the commencement of each round voyage and found in all respects fit, and unless the Association has approved in writing the form of contract under which such cargo is accepted for transportation;

PASSENGERS' EFFECTS.

(c) Loss or damage to any passenger's baggage or personal effects, unless the form of ticket issued to the passenger shall have been approved, in writing, by the Association;

DEVIATION.

(d) Loss, damage or expense arising from any deviation in breach of the Assured's obligation to cargo, known to the Assured in time to enable him specifically to insure his liability therefore, unless notice thereof has been given the Association, and the Association has agreed, in writing, that such insurance was unnecessary;

STOWAGE IN IMPROPER SPACES.

(e) Loss, damage or expense arising from stowage of under deck cargo on deck, or stowage of cargo in spaces not suitable for its carriage, unless the Assured shall show that every reasonable precaution has been taken by him to prevent such improper stowage;

BILLS OF LADING.

(f) Loss, damage or expense arising from issuance of clean bills of lading for goods known to be missing, unsound or damaged;

(g) Loss, damage or expense arising from the intentional issuance of bills of lading prior to receipt of the goods described therein, or covering goods not received at all;

(h) Loss, damage or expense arising from delivery of cargo without surrender of bills of lading;

FREIGHT.

(i) Freight on cargo short-delivered, whether or not prepaid, or whether or not included in the claim and paid by the Assured;

AND PROVIDED FURTHER THAT:

(j) Liability hereunder shall in no event exceed that which would be imposed by law in the absence of contract;

PROTECTIVE CLAUSES REQUIRED IN CONTRACT OF AFFREIGHTMENT.

(k) Liability hereunder shall be limited to such as would exist if the charter party, bill of lading or contract of affreightment contained (A) a negligence general average clause in the form hereinafter specified under Paragraph (12); (B) a clause providing that any provision of the charter party, bill of lading or contract of affreightment to the contrary notwithstanding, the Assured and the insured vessel shall have the benefit of all limitations of and exemptions from liability accorded to the owner or chartered owner of vessels by any statute or rule of law for the time being in force; (C) such clauses, if any, as are required by law to be stated therein; (D) and such other protective clauses as are commonly in use in the particular trade;

CARRIAGE OF GOODS BY SEA ACT.

(l) When cargo carried by the insured vessel in under a bill of lading or similar document of title subject or made subject to the Carriage of Goods by Sea Act of the United States or a law of any other contract of similar import, liability hereunder shall be limited to such as is imposed by said Act or law, and if the Assured or the insured vessel assumes any greater liability or obligation, either in respect of the valuation of the cargo or in any other respect, than the minimum liabilities and obligations imposed by said Act or law, such greater liability or obligation shall not be covered hereunder;

LIMIT OF $500, PER PACKAGE.

(m) When cargo carried by the insured vessel is under a charter party, bill of lading or contract of affreightment not subject or made subject to the Carriage of Goods by Sea Act of the United States or a law of any other country of similar import, liability hereunder shall be limited to such as would exist if said charter party, bill of lading or contract of affreightment contained a clause exempting the Assured and the insured vessel from liability for losses arising from unseaworthiness provided that due diligence shall have been exercised to make said vessel seaworthy and properly manned, equipped and supplied, and a clause effectively limiting the Assured's liability for total loss or damage to goods shipped to

$500. per package, or in case of goods not shipped in packages, per customary freight unit, and providing for pro rata adjustment on such basis for partial loss or damage;

ORAL CONTRACT.

(n) In the event cargo is carried under on arrangement not reduced to writing, the Association's liability hereunder shall be no greater than if such cargo had been carried under a charter party, bill of lading or contract of affreightment containing the clauses referred to herein;

ASSURED'S OWN CARGO.

(o) Where cargo on board the insured vessel is the property of the Assured, such cargo shall be deemed to be carried under a contract containing the protective clauses described in clauses (k), (l), and (m) herein: and such cargo shall be deemed to be fully insured under the usual form of cargo policy, and in case of loss of or damage to such cargo the Assured shall be insured hereunder in respect of such loss or damage only to the extent that he would hove been if the cargo had belonged to another, but only in the event and to the extent that the loss or damage would not be recoverable from marine insurers under a cargo policy as above specified:

TRANSPORTATION ON LAND OR OTHER CRAFT.

(p) No liability shall exist hereunder for any loss, damage or expense in respect of cargo, or baggage and personal effects of passengers being transported on land or while on another vessel or craft unless such loss, damage or expense is caused directly by the insured vessel, her master, officer or crew;

CARGO ON DOCK.

(q) No liability shall exist hereunder for any loss. damage or expense in respect of cargo, or baggage and personal effects of passengers before loading on or after discharge from the insured vessel caused by flood, tide, windstorm, earthquake, fire, explosion, heat, cold, deterioration, collapse of wharf, leaky shed, theft or pilferage unless such loss, damage or expense is caused directly by the insured vessel, her master, officers or crew;

(r) A deduction of $ shall be made from any claim or claims with respect to each cargo carried, including passengers' baggage and personal effects.

FINES AND PENALTIES.

(8) LIABILITY FOR FINES AND PENALTIES FOR THE VIOLATION OF ANY LAWS OF THE UNITED STATES, OR OF ANY STATE THEREOF, OR OF ANY FOREIGN COUN-

TRY; PROVIDED, HOWEVER, THAT THE ASSOCIATION SHALL NOT BE LIABLE TO INDEMNIFY THE ASSURED AGAINST ANY SUCH FINES OR PENALTIES RESULTING DIRECTLY OR INDIRECTLY FROM THE FAILURE, NEGLECT OR FAULT OF THE ASSURED OR ITS MANAGING OFFICERS TO EXERCISE THE HIGHEST DEGREE OF DILIGENCE TO PREVENT A VIOLATION OF ANY SUCH LAWS.

(o) Claims hereunder are subject to a deduction of $ with respect to each fine or penalty,

MUTINY, MISCONDUCT.

(9) LIABILITY FOR EXPENSES INCURRED IN RESISTING ANY UNFOUNDED CLAIM BY A SEAMAN OR OTHER PERSON EMPLOYED ON BOARD THE INSURED VESSEL, OR IN PROSECUTING SUCH PERSON OR PERSONS IN CASE OF MUTINY OR OTHER MISCONDUCT; NOT INCLUDING, HOWEVER, COSTS OF SUCCESSFULLY DEFENDING CLAIMS ELSEWHERE PROTECTED IN THIS POLICY.

(a) Claims hereunder are subject to a deduction of $ with respect to each occurrence.

QUARANTINE EXPENSES.

(10) LIABILITY FOR EXTRAORDINARY EXPENSES, INCURRED IN CONSE-

QUENCE OF THE OUTBREAK OF PLAGUE OR OTHER DISEASE ON THE INSURED VESSEL, FOR DISINFECTION OF THE VESSEL OR OF PERSONS ON BOARD, OR FOR QUARANTINE EXPENSES, NOT BEING THE ORDINARY EXPENSES OF LOADING OR DISCHARGING, NOR THE ORDINARY WAGES OR PROVISIONS OF CREW OR PASSENGERS; PROVIDED, HOWEVER, THAT NO LIABILITY SHALL EXIST HEREUNDER IF THE VESSEL BE ORDERED TO PROCEED TO A PORT WHERE IT IS KNOWN THAT SHE WILL BE SUBJECTED TO QUARANTINE.

(a) Each claim hereunder is subject to a deduction of $

PUTTING IN EXPENSES.

(11) LIABILITY FOR PORT CHARGES INCURRED SOLELY FOR THE PURPOSE OF PUTTING IN TO LAND AN INJURED OR SICK SEAMAN OR PASSENGER, AND THE NET LOSS TO THE ASSURED IN RESPECT OF BUNKERS, INSURANCE, STORES AND PROVISIONS AS THE RESULT OF THE DEVIATION.

CARGO'S PROPN. G/A.

(12) LIABILITY FOR CARGO'S PROPORTION OF GENERAL AVERAGE, INCLUDING SPECIAL CHARGES, SO FAR AS THE ASSURED IS NOT ENTITLED TO

RECOVER THE SAME FROM ANY OTHER SOURCE; PROVIDED, HOWEVER, THAT IF THE CHARTER PARTY, BILL OF LADING OR CONTRACT OF AFFREIGHTMENT DOES NOT CONTAIN THE NEGLIGENCE GENERAL AVERAGE CLAUSE QUOTED BELOW, THE ASSOCIATION'S LIABILITY HEREUNDER SHALL BE LIMITED TO SUCH AS WOULD EXIST IF SUCH CLAUSE WERE CONTAINED THEREIN: VIZ.

NEGLIGENCE G/A CLAUSE.

"In the event of accident, danger, damage or disaster. before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible, by statute, contract, or otherwise, the goods, the shipper and the consignee shall contribute with the Carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully and in the same manner as if such salving ship or ships belonged to strangers."

(a) Claims hereunder are subject to a deduction of $ with respect to each accident or occurrence.

DISCHARGE OF OIL OR OTHER SUBSTANCE.

(13) LIABILITY FOR EXPENSES ARISING OUT OF ACTION TAKEN IN COMPLIANCE WITH THE LAWS OF THE UNITED STATES OR ANY STATE OR SUBDIVISION THEREOF OR OF ANY COUNTRY TO AVOID DAMAGE FROM, OR TO MINIMIZE OR REMOVE, ANY DISCHARGE, SPILLAGE, EMISSION OR LEAKAGE OF OIL, PETROLEUM PRODUCTS, CHEMICALS OR OTHER SUBSTANCES.

(a) Claims hereunder are subject to a deduction of $ with respect to each accident or occurrence.

EXPENSES OF INVESTIGATION AND DEFENSE.

(14) LIABILITY FOR COSTS, CHARGES AND EXPENSES REASONABLY INCURRED AND PAID BY THE ASSURED IN CONNECTION WITH ANY LIABILITY INSURED UNDER THIS POLICY, SUBJECT, HOWEVER, TO THE SAME DEDUCTION THAT WOULD BE APPLICABLE UNDER THIS POLICY TO THE LIABILITY DEFENDED; PROVIDED THAT IF ANY LIABILITY IS INCURRED AND PAID BY THE ASSURED AS AFORESAID, THE DEDUCTION SHALL BE APPLIED TO THE AGGREGATE OF THE CLAIM AND EXPENSES, AND PROVIDED FURTHER THAT THE ASSURED SHALL NOT BE ENTITLED TO INDEMNITY FOR

EXPENSES UNLESS THEY WERE INCURRED WITH THE APPROVAL IN WRITING OF THE ASSOCIATION, OR THE ASSOCIATION SHALL BE SATISFIED THAT SUCH APPROVAL COULD NOT HAVE BEEN OBTAINED UNDER THE CIRCUMSTANCES WITHOUT UNREASONABLE DELAY, OR THAT THE EXPENSES WERE REASONABLY AND PROPERLY INCURRED; AND PROVIDED FURTHER THAT ANY SUGGESTION OR APPROVAL OF COUNSEL, OR INCURRING OF EXPENSES IN CONNECTION WITH LIABILITIES NOT INSURED UNDER THIS POLICY, SHALL NOT BE DEEMED AN ADMISSION OF THE ASSOCIATION'S LIABILITY.

(a) It is understood and agreed that the Association may undertake the investigation of any occurrence which might develop into a claim against the Assured, and may undertake the investigation and defense of any claim made against the Assured with respect to which the Assured shall be or may claim to be insured by the Association, and that during such investigation and/or defense the Association may incur expenses, which expenses shall be for the account of the Assured, and such investigation and/or defense shall not be considered as an admission of the Association's liability for such claim or expenses, and the liability of the Association to the Assured for any loss, damage or expense shall not be affected by

any acts of the Association prior to formal presentation to the Association of the Assured's claim for reimbursement or indemnity.

(15) EXPENSES WHICH THE ASSURED MAY INCUR UNDER AUTHORIZATION OF THE ASSOCIATION IN THE INTEREST OF THE ASSOCIATION.

GENERAL CONDITIONS AND LIMITATIONS

PROMPT NOTICE OF CLAIM.

(16) In the event of any happening which may result in loss, damage or expense for which the Association may become liable, prompt notice thereof, on being known to the Assured, shall be given by the Assured to the Association.

(17) The Association shall not be liable for any claim not presented to the Association with proper proofs of loss within one year after payment by the Assured.

TIME FOR SUIT.

(18) In no event shall suit on any claim be maintainable against the Association unless commenced within two years after the loss, damage or expense resulting from liabilities, risks, events, occurrences and expenditures specified under this policy shall have been paid by the Assured.

ASSURED'S FAILURE TO SETTLE CLAIMS.

(19) If the Assured shall fail or refuse to settle any claim as authorized or directed by the Association, the liability of the Association to the Assured shall be limited to the amount for which settlement could have been made, or, if the amount is unknown, to the amount which the Association authorized.

DEFENSE OF CLAIMS.

(20) Whenever required by the Association, the Assured shall aid in securing information and evidence and in obtaining witnesses and shall cooperate with the Association in the defense of any claim or suit or in the appeal from any judgment, in respect of any occurrence as hereinbefore provided.

ASSUMED CONTRACTUAL LIABILITY.

(21) Unless otherwise agreed by endorsement hereon, the Association's liability shall in no event exceed that which would be imposed on the Assured by law in the absence of contract; provided, however, that the Assured's right of indemnity from the Association shall include any loss, damage or expense covered under the provisions of this policy arising as a result of any contract for the employment of tugs where such contract is one which is substantially similar to those customarily in use or in force during the currency of this policy. The Assured's right

of indemnity hereunder shall not include any liability for loss, damage or expense arising from collision between the insured vessel and another vessel or craft, other than liability consequent on such collision, (a) for removal of obstructions under statutory powers, (b) for damage to any dock, pier, jetty, bridge, harbor, breakwater, structure, beacon, buoy, lighthouse, cable or similar structures, (c) in respect of the cargo of the insured vessel and (d) for loss of life, personal injury and illness.

ASSIGNMENT.

(22) No claim or demand against the Association shall be assigned or transferred without the written consent of the Association, and unless otherwise specifically agreed by endorsement hereon no person other than the Assured or Loss Payee named herein, or a receiver of the property or estate thereof, shall acquire any right against the Association hereunder.

SUBROGATION.

(23) The Association shall be subrogated to all the rights which the Assured may have against any other person or entity, in respect of any payment made under this policy, to the extent of such payment, and the Assured shall, upon the request of the Association, execute all documents necessary to secure to the Association such rights.

OTHER INSURANCE.

(24) The Association shall not be liable for any loss, damage or expense against which, but for the insurance herein provided, the Assured is or would be insured under existing insurance.

LIMITATION OF LIABILITY.

(25) If and when the Assured under this policy has any interest other than as an owner or bareboat charterer of the insured vessel, in no event shall the Association be liable hereunder to any greater extent than if such Assured were the owner or bareboat charterer and were entitled to all the rights of limitation to which a shipowner is entitled.

LAY-UP RETURNS.

(26) If an insured vessel shall be and remain in any safe port for a period of thirty (30) or more consecutive days after finally mooring there (such period being computed from the day of arrival to the day of departure, one only being included) the Association is to return 77.5 per cent of the initial annual premium, prorated daily, for the period the insured vessel shall be laid up without cargo and without crew (other than a skeleton crew) and to return 32.5 per cent of the initial annual premium, prorated daily, for the period the insured vessel shall be laid up with cargo or crew on board, provided the Assured give written notice to the Associa-

tion as soon as practicable after the commencement and termination of such lay up period. The Association shall have absolute discretion to determine whether a port is safe and how many crew members constitute a skeleton crew within the meaning of this paragraph.

LIMIT OF AMOUNT INSURED.

(27) Liability hereunder in respect of any one accident or occurrence is limited to the amount hereby insured.

CANCELLATION PROVISIONS:

CANCELLATION.

(28) (a) If the insured vessel should be sold or requisitioned, the Association shall have the option to cancel insurance hereunder with respect to the insured vessel, the Association to return 6.875 per cent of the gross annual premium for each thirty (30) consecutive days of the unexpired term of the insurance with respect to said vessel. If the entire management, control and possession of the insured vessel be transferred whether by demise charter or by change in corporate ownership or control of the insured owner, the Association shall have the option to cancel insurance hereunder with respect to the insured vessel, the Association to return three (3) percent of the gross annual premium for each thirty (30) consecutive days of the unexpired term of the insurance with

respect to said vessel. Cancellation shall not relieve the Assured from liability for premiums under this policy and for assessments levied and to be levied for deficiencies and impairments in respect to the insurance year for which the policy was originally written.

(b) In the event of non-payment of the full premium within sixty (60) days after attachment, or, if installment payment of the premium has been arranged, in the event of non-payment of any installment thereof within twenty (20) days after it is due, this policy may be cancelled by the Association upon five (5) days' written notice being given the Assured. Should this policy be cancelled under the provisions of this clause or otherwise or should the Assured fail to pay any assessment within ten (10) days after it is due or should the Assured or any of them become insolvent or bankrupt or assign its property for the benefit of creditors or suffer the appointment of a receiver for its property or any part thereof or of the institution of dissolution proceedings by or against it, the Association shall not be liable for any claims whatsoever under this policy unless within sixty (60) days from the date of such cancellation or the occurrence of such insolvency, bankruptcy, assignment, receivership or dissolution proceedings, there are paid to the Association by or on behalf of the Assured all premiums due, and the payment of any premiums to become due

as well as all possible assessments is unconditionally guaranteed by a responsible surety.

(c) In the event that Sections 182 to 189, both inclusive, of U.S. Code, Title 46, or any other existing law or laws determining or limiting liability of shipowners and carriers, or any of them, shall, while this policy is in force, be modified, amended or repealed, or the liabilities of shipowners or carriers be increased in any respect by legislative enactment, the Association shall have the right to cancel said insurance upon giving thirty (30) days' written notice of their intention so to do, and in the event of such cancellation, make return of premium upon a pro rata daily basis.

RISKS EXCLUDED.

(29) NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS POLICY, THE ASSOCIATION SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR EXPENSE SUSTAINED, DIRECTLY OR INDIRECTLY, BY REASON OF:

(a) Loss, damage or expense to hull, machinery, equipment or fittings of the insured vessel, including refrigerating apparatus and wireless equipment, whether or not owned by the Assured;

(b) Concealment or breach of any charter or contract, detention of the vessel, bad debts, insolvency, fraud of agents, loss of freight,

passage money, hire, demurrage or any other loss of revenue;

(c) Any loss, damage, sacrifice or expense of a type, character or kind which would be payable under the terms of a policy written on the American Institute Hull Clauses (June 2, 1977) Form and a policy written on the American Institute Increased Value end Excess Liabilities Clauses (November 3, 1977) Form whether or not the insured vessel is fully covered under those policies by insurance and excess insurance sufficient in amount to pay in full and without limit all such loss, damage, sacrifice or expense;

(d) The insured vessel towing any other vessel or croft, unless such towage was to assist such other vessel or craft in distress to a port or place of safety; provided, however, that this exception shall not apply to claims covered under Paragraph (1) of this policy;

(e) For any claim for loss of life, personal injury or illness in relation to the handling of cargo where such claim arises under a contract of indemnity between the Assured and his sub-contractor.

TUGS.

(30) In every case where this policy insures tugs, Clause (b) of Paragraph (6) and Clause (c) of Paragraph (29) shall be deemed to refer to the American Institute Tug Form, August 1, 1976 instead of the American Institute Hull Clauses (June 2, 1977) Form and Paragraph

(3) shall be deemed to incorporate the Collision Clause contained in said policy (American Institute Tug Form, August 1, 1976) instead of the Collision Clause quoted in said Paragraph (3) and the following clause shell be substituted for and supersede Clause (d) of Paragraph (29) namely

"Loss of or damage to any vessel or vessels in tow and/or their cargoes, whether such loss or damage occurs before, during or after actual towage: provided, that this exception shaft not apply to claims under Paragraph (1) of this policy."

WAR RISKS.

(31) Notwithstanding anything to the contrary contained in this policy, the Association shall not be liable for or in respect of any loss, damage or expense sustained by reason of capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat: or sustained in consequence of military, naval or air action by force of arms, including mines and torpedoes or other missiles or engines of war, whether of enemy or friendly origin: or sustained in consequence of placing the vessel in jeopardy as an act or measure of war taken in the actual process of a military engagement, including embarking or disembarking troops or material of war in the immediate zone of such engagement: and any such loss, damage and expense shall be excluded from this policy without regard to whether the

Assured's liability therefor is based on negligence or otherwise, and whether before or alter a declaration of war.

IN WITNESS WHEREOF the Association has caused this Policy to be signed in its behalf this 16th day of March 1931.

AMERICAN STEAMSHIP OWNERS
MUTUAL PROTECTION AND INDEMNITY
ASSOCIATION, INC.

By Shipowners Claims Bureau, Inc., Manager

/s/ THOMAS J. [ILLEGIBLE]

Authorized Signature

ENDORSEMENT to be attached to and made apart of Policy No. A-5191
ASSURED PRUDENTIAL LINES, INC.

SCHEDULE OF VESSELS

Vessel	G.R.T.	Non-Assessable Rate	Non-Assessable Premium	Assessable Rate	Assessable Premium	Total Rate	Total Premium
LASH ATLANTICO	26,406	.12	$3,168.72	9.04	$238,710.24	9.16	$241,878.
LASH ITALIA	26,406	.12	3,168.72	9.04	238,710.24	9.16	241,878.
LASH PACIFICO	26,406	.12	3,168.72	9.04	238,710.24	9.16	241.878.
SAROULA	19,291	.12	2,314.92	3.65	70,412.15	3.77	72,727.
	98,509		$11,821.08		$786,542.87		$798,363.

EACH VESSEL TO BE DEEMED A SEPARATE INTEREST AND INSURANCE.

All other terms and conditions remaining unchanged.

AMERICAN STEAMSHIP OWNERS
MUTUAL PROTECTION AND INDEMNITY
ASSOCIATION, INC.

SHIPOWNERS CLAIMS BUREAU, INC., Manager

By /s/ THOMAS J. [ILLEGIBLE]
Authorized Signature

New York March 16, 1981

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

05-5924-bk(L), 05-5925-bk(Con)
Filed June 6, 2008

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 6th day of June two thousand six,

Present: Hon. Robert D. Sack,
Hon. Robert A. Katzmann,
Circuit Judges,

Hon. J. Garvan Murtha,*
District Judge.

LEE J. DICOLA; TRUSTEE OF
PLI DISBURSEMENT TRUST,

Appellant,

---

* The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

ASBESTOSIS CLAIMANTS,

Claimants-Appellants,

—v.—

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION and INDEMNITY ASSOCIATION, INC.,

Appellee.

Appellee moves to dismiss the appeal docketed under 05-5924-bk for lack of appellate jurisdiction. Upon due consideration, it is ORDERED that the motion is GRANTED and the appeal is DISMISSED, because this court lacks jurisdiction to hear an appeal filed by an appellant who was not a party in the proceeding below. *See Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405, 2409 (1988). The request for sanctions under Fed. R. App. P. 38 is DENIED. The appeal docketed under 05-5925-bk will proceed.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ LUCILLE CARR

123

(2)

No. 08-719

FILED
MAR 13 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC.,

Petitioner,

v.

ASBESTOSIS CLAIMANTS REPRESENTED BY THE MARITIME ASBESTOSIS LEGAL CLINIC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ALAN KELLMAN
THE MARITIME ASBESTOSIS LEGAL CLINIC, A DIVISION OF THE JAQUES ADMIRALTY LAW FIRM, P.C.
645 Griswold, Suite 1570
Detroit, Michigan 48226-4116

SANFORD F. YOUNG
Counsel of Record
LAW OFFICES OF SANFORD F. YOUNG, P.C.
225 Broadway
New York, New York 10007
(212) 227-9755

Attorneys for Respondents Asbestosis Claimants

221483

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Does Petitioner present compelling reasons to grant the Petition where the subject matter of the Second Circuit's Opinion, *i.e.*, the enforcement of the express payment and set-off provisions contained in the Second Amended Joint Plan of Reorganization of the Prudential Lines, Inc., as Modified, dated August 17, 1990 and duly confirmed by the Bankruptcy Court on October 4, 1990 [the "Plan"]:

a. is *sui generis* and has no significance beyond the parties;

b. does not conflict with any decision of this Court or any United States Court of Appeals and does not implicate any important federal question;

c. involves underlying issues which are controlled by state law; and

d. enforces Plan provisions which are binding on Petitioner since it did not appeal from the confirmation thereof?

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INTRODUCTION

This matter arises from a contested proceeding originating in the Bankruptcy Court for the Southern District of New York in December 1990. The Petition centers on the interpretation and enforcement of one sub-section of the Debtor, Prudential Lines, Inc. ["PLI"]'s 1990 Bankruptcy Plan. Those provisions were specifically included in the Plan to enable the Trustee to pay the outstanding claims of over 10,000 victims of asbestos poisoning and other designated Class 5C claimants, for which the Trustee can thereby seek reimbursement under various marine insurance policies written by Petitioner, American Steamship Owners Mutual Protection and Indemnity Association, Inc. [oftentimes referred to as "the Club"]. Petitioner is a self-insurance group set up by the industry, to which the Debtor was a member for over 40 years. The Asbestosis Claimants were merchant marine-employees of the Debtor's former shipping line, Prudential Lines, Inc.

The Plan's arrangement is patterned on a plan approved in *Liman v. American Steamship Owners Mut. Protection and Indem. Assn*, 299 F.Supp. 106 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 627 (1969) (*per curiam*). The Plan thus created a "Liman Fund" of $300,000 to be used by the PLI Disbursements Trust to pay each Class 5C Claimant for his or her allowed claims.[1] After paying each claim, the Trustee obtains reimbursement from Petitioner under the applicable insurance policy.

---

[1] So as to preserve the balance of the fund, the Trustee has agreed to waive his future fees.

As the Liman Fund is replenished, the Trustee is enabled to pay more allowed claims, which are likewise reimbursed by the Club, which process continues until all claims are paid "on a sustaining basis." See, Plan §4.05.07(a)(i) (App.71a-74a).[2]

To accommodate Petitioner's claim that it is entitled to offsets for unpaid premiums for four out of 41 policy years of coverage, the Plan provides that "each holder of an affected Allowed Insured Claim shall share [offsets] ratably (with all other holders of affected Allowed Insured Claims. . .)." Plan §4.05.07(a)(iv) (App.77a-78a; paren. in original). The amount of each claimant's pro rata share of the Club's offsets, as well as the policy deductible attributable to each claimant becomes that claimant's general unsecured claim against the bankrupt estate (Plan §4.05.07(a)(i)(3rd para.; App.73a). *See also*, *Prudential IV* at App.286a-287a & 296a.

Petitioner's 20-plus year battle against meeting its obligations under the insurance policies at issue (which included two earlier appeals to the Second Circuit; *see*, App.242a, and 59 F.3d 327 (1995)) culminated in the 2008 Opinion holding that the Plan provisions should be enforced as written. After being denied a rehearing by the panel and *en banc* rehearing, Petitioner's last gasp is the instant Petition which tries desperately to fabricate a federal question. There is nothing about the Second Circuit Opinion that suggests any conflict with any decision of this Court or any Circuit Court, nor that

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[2] References preceded by "App." are to pages of Petitioner's Appendix; "Pet." to pages of the Petition itself; and "Cir.Ct-J.A." to the Joint Appendix submitted to the Second Circuit.

implicates any federal question, whether compelling, significant or otherwise. In fact, the heart of all issues surrounding Petitioner's insurance obligations, as articulated in all of the prior decisions in this matter, are controlled by state law. Among those is the Second Circuit Opinion which, drawing upon the prior unappealed holdings that are the *law of the case*, does little more than enforce the Plan provisions precisely as they have been intended and written.

The bottom line is that the sole issue raised by Petitioner is *sui generis* to this case, and merely involves the construction and interpretation of several words contained in the singular Bankruptcy Plan, which when it was confirmed, became binding on Petitioner as if it were a court order or contract.

On every level — whether based on contract construction, state law or Petitioner's new argument under 11 U.S.C. §553 – there is no merit to its argument. As recognized in the Second Circuit Opinion, the Bankruptcy Court in a final, binding 1992 decision held that Petitioner was liable under 41-years of separate annual policies, for which 37 were fully paid for. Accordingly, the Second Circuit Opinion reasoned that since the various claims at issue could be made under any of the fully-paid policies – wherein the prior 1992 Bankruptcy Court decision (*Prudential I*; App.124a) and 1998 Second Circuit Opinion (*Prudential IV*; App.242a) also found that since asbestos exposure covers many years, coverage can be obtained under any policy year therein – it would "not [ ] interpret it [the ability to ratably offset] as an absolution, parlaying the

Insurer's immunity as to four unpaid policy years into an immunity also covering thirty-seven fully paid years" (App.17a).

STATEMENT OF THE CASE

The Parties

Prudential Lines, Inc. [the Bankrupt Debtor]

PLI is the successor company to what was once among the oldest and largest United States flag fleets, the Grace Lines, formed in 1860. PLI owned and operated a commercial shipping fleet of over 700 ships and employed tens of thousands of seamen. In November 1986, an involuntary bankruptcy petition was filed.

Petitioner – American Steamship Owners Mutual Protection and Indemnity Association, Inc.

Petitioner-Club is a mutual indemnity insurance association of ship owners organized to provide its members with marine protection and indemnity coverage. On an annual basis, members pay premiums and can be assessed additional amounts to cover the cost of claims. Petitioner obtains reinsurance for approximately 90% of its policies. Petitioner, which was formed in 1917 and still active, is the only such organization in the United States and one of 13 such associations worldwide. Together, they insure approximately 90% of the world's shipping. PLI was an insured member of Petitioner from 1940 to 1970 and from

1975 to 1986. During those years, PLI paid Petitioner millions of dollars in premiums and assessments in exchange for annual insurance contracts.

Respondent – Asbestosis Claimants

Over the decades preceding PLI's bankruptcy, thousands of its merchant marine employees were exposed to asbestos aboard its ships. Among the claimants are 1328 that have been diagnosed with mesothelioma and lung and other malignant cancers caused by asbestosis, and over 1300 wrongful death claims (which number increases every several days).[3] All told, there are approximately 10,000 former PLI employees who have been suffering or died from asbestos-related diseases whose claims are being adjudicated in a multi-district litigation before the Eastern District of Pennsylvania. *In re Asbestos Products Litigation / In Re Ohio Asbestos Litigation*, Docket No. 2 MDL 875. In the MDL court, the proposed settlement by and between the PLI Disbursements Trustee and the Asbestos Claimants ranges from $350,000 for mesothelioma (Level VIII) and $95,000 for lung cancer (Level II) to $600 for Level I asbestos-related diseases. As a group, the Asbestosis Claimants are Respondents in the instant proceeding.

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[3] During Petitioner's oral argument before the Second Circuit, the panel expressed concern for the number of deaths that occurred over the years that Petitioner has dragged out the matter. Further, because the Plan provides that the PLI Disbursement Trust "in no event shall [] exist for more than 20 years" (App.81a) – *i.e.*, October 2010 —Petitioner is motivated for further delays.

The Plan of Reorganization

PLI's Bankruptcy and the Plan

Pursuant to an uncontested petition, PLI entered Chapter 11 bankruptcy in November 1986. Following extensive negotiations and multiple drafts, a majority of PLI's creditors approved the Second Amended Joint Plan of Reorganization, as Modified, dated August 17, 1990 [the "Plan"] (App.60a-85a). The Asbestosis Claimants voted to accept the Plan, reversing their vote against an earlier draft, in response to certain amendments incorporated into the Plan as approved. The Bankruptcy Court confirmed the Plan on October 4 , 1990 (App.127a).

PLI Disbursement Trust

The Plan and the accompanying PLI Disbursement Trust Agreement created the PLI Disbursement Trust to handle the payment of various insured claims so as to "secure the insurance rights of PLI" and take steps "reasonably intended to obtain the benefits of insurance . . ." (App.72a). As expressed in Section 4.05.07(a)(ii) of the Plan: "To the extent possible, the provisions of this Plan are designed to preserve insurance rights. . ." (App.74a), and provides that "the Bankruptcy Court shall have continuing jurisdiction over all aspects of the efforts to preserve insurance rights for the benefit of holders of Allowed Insured Claims" (App.75a). *See also,* Section 4.05.07(a)(v) (A.77a-78a). The corresponding Trust Agreement authorizes the Trustee to make distributions to holders of Allowed Claims and "pursue

rights with respect to Insured Claims as provided in Section 4.05.07(a) of the Plan" (Cir.Ct.-J.A.546; *see also,* at 555).

Many claims against PLI have long since been adjudicated or otherwise settled. The majority of the outstanding Class 5C claims are those of the Asbestosis Claimants. Also in that class are approximately $1,610,000 for outstanding allowed cargo damage claims and $1,120,000 for other personal injury claims (Cir.Ct.-J.A.32; *see also*, Plan §2.07 at App.68a).

The Liman Fund

To satisfy the pay-first requirements, Section 4.05.07(a)(i) of the Plan created a "Liman Fund" of $300,000 from which the Trustee can begin paying claims and then obtain reimbursement from the Club, so that the next claim can be paid and reimbursed from the Club "on a sustaining basis":

> In order to fund the payment of Allowed Insured Claims . . . the PLI Disbursement Trust shall set aside and place in reserve $300,000 . . . Such Liman Funds shall be used solely to fund payments of Allowed Insured Claims . . . Upon repayment and/or reimbursement of the full amount of an Allowed Insured Claim paid by the PLI Disbursement Trust using Liman Funds, the funds repaid and/or reimbursed shall be added back to the Liman Funds such that the $300,000 is available as needed on a sustaining basis for use in funding the payment of Allowed Insured Claims.

(App.74a). The intent to utilize the Liman Fund to support the sequential payment of claims and obtain reimbursement from the Club is clearly stated:

> The PLI Disbursement Trustee may . . . take other steps as specified herein reasonably intended to obtain the benefits of insurance. . . . In particular, to the extent necessary in order to obtain payment by a Club or other insurer of Excess Claims,[4] . . . the PLI Disbursement Trustee is authorized to enter into arrangements under which in substance the PLI Disbursement Trust pays the Allowed Insured Claim in full in cash; the holder of the Allowed Insured Claim repays in cash the full amount of the Deductible Claim and the Club or other insurer reimburses the PLI Disbursement Trust in cash for the full amount of the Excess Claim . . .; and the holder of the Allowed Insured Claim is given an Allowed Claim in Class 5C in the amount of the Deductible Claim.

(App.72a-73a).

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[4] The Plan defines "Excess Claim to mean that portion . . . of an Allowed Insured Claim that exceeds the Deductible Claim." (App.64a). "Deductible Claim" refers to the applicable insurance deductible (App.63a-64a). An "Allowed Insured Claim" is the subject of the full Liman provision that is here under discussion. §4.05.07(a) (App.71a-78a).

Petitioner's Set-Off Right and the Plan's Pro Rata Provision

At the time the Plan was written (1990 and before), it was anticipated that the total amount of Petitioner's claimed offsets would exceed the amount of any single insured claim. Therefore, to assure PLI's rights of indemnity, Section 4.05.07(a)(iv) was written to provide that the total offsets would be shared on a pro rata basis among all Class 5C Claimants:

> To the extent there shall be a determination that amounts are due and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI to the extent possible, each holder of an affected Allowed Insured Claim shall share ratably . . . (a) a claim against the offset or recouped amount and shall receive in distribution therefor an Allowed Claim in Class 5C and (b) a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefor, to the extent recovered, cash from the insurer or Club equal to such holder's ratable share. (App.77a-78a).[5]

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[5] The Plan defines *pro rata* "with respect to a Creditor in Class . . . 5C . . . and with respect to a particular distribution under the Plan, in the same proportion that the Allowed Claim held by such creditor bears to the aggregate of all Allowed Claims of all Creditors in such class. . ." (App.67a).

The official Disclosure Statement further explains the set-off procedure:

> [T]he modified Plan provides that to the extent amounts are owing from PLI to a Club which the Club can offset or recoup against amounts due to PLI . . . and to the extent possible, each holder of an affected Allowed Insured Claim will share ratably a Class 5C Claim equal to the offset or recouped amount (as well as a Class 5C Claim equal to the Deductible Claim). As a result, the cash payments that otherwise might be obtained from the American Club in respect of certain Excess Claims may be reduced. The American Club has to date not agreed to such a procedure.

(App.119a).

As described in the 1992 decision in *Prudential I*, Petitioner filed a proof of claim for unpaid premiums and assessments for four of the 41 policies: 1979, 1983, 1984 and 1985, which total amount was stipulated at $1,270,980 (App.166a).

Relevant Procedural Background

The Second Circuit's 1998 Decision – Prudential IV

After the Plan was confirmed, the Trustee commenced a declaratory action to enforce the Plan provisions relating to the 5C Claimants (of which the Asbestos Claimants are the largest component) and the

Petitioner's insurance policies. *See, Prudential I* (App.124a), which wound its way to the Second Circuit in *Prudential IV* (App.242a). Although the Second Circuit rejected a so-called "recycling arrangement" that was proposed by the Trustee and Asbestos Claimants as a way of streamlining and expediting the Trustee's payment and Petitioner's reimbursement of claims,[6] the court expressly noted that:

> At oral argument, the parties agreed that there are other available mechanisms (albeit less efficient) for triggering American Club's indemnification obligations. The Claimants suggested specifically that the $300,000 set aside to fund the recycling could be used to settle individual claims. American Club did not contest the availability of those funds for this purpose, and we do not read the reorganization plan to preclude such use. . .

(App.254a). The Court thus went on to decide other issues regarding the application of policy periods, deductibles and assessments applicable to each claim (App. 267a- 296a).

The Second Circuit Opinion at Issue

Following *Prudential IV*, the matter once again came before the Bankruptcy Court whereby an order was

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[6] Under the hybrid arrangement, the payment to each claimant would have been represented by a bookkeeping entry, with a corresponding entry for the claimant lending the money back to the Trust in the form of a non-recourse loan (App.248a-249a).

sought declaring that the Trustee is authorized under Plan §4.05.07(a)(iv) to apply the Club's set-off ratably among all holders of Allowed Claims and has received the "adequate assurances and documentation" required by Plan §4.05.07(a)(i) (3rd para.). The Bankruptcy Court denied the motion by order dated January 19, 2005 (App.24a) and the District Court affirmed (App.32a). In the Opinion dated June 19, 2008, the Second Circuit reversed and remanded (App.1a, *see also*, 58a). By Order dated September 2, 2008, the Second Circuit denied Petitioner's motion for a panel rehearing and, alternatively, a hearing *en banc* (App.56a).

REASONS FOR DENYING THE PETITION

I. PETITIONER DOES NOT RAISE ANY COMPELLING ISSUES WARRANTING THE GRANT OF *CERTIORARI*

Petitioner does not meet its burden of demonstrating any compelling reason why its Petition should be granted. The Second Circuit Opinion does not raise any issues concerning the public interest or otherwise warranting the Court's attention. Rather, Petitioner's contentions are of interest solely to the parties to this dispute, and are *sui generis* to the interpretation and enforcement of several phrases contained in one particular 19-year old Bankruptcy Plan. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955), in dismissing a *writ of certiorari*, the Court explained, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that

of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," quoting, *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Further, there is no argument that the Second Circuit Opinion is in conflict with any decision of the Court or another Court of Appeals, decides an important federal question or has departed from any accepted and usual course of judicial proceedings. *See*, Court Rule 10(a). In fact, as Petitioner's concede and the prior binding decisions demonstrate, the sole issue raised in the Petition — involving claimed setoffs for unpaid insurance premiums for only four of the 41 years of insurance at issue — is controlled by state law (Pet.13 & 17; *see*, *Prudential I*, App.125a-127a, 143a-149a, 152a-165a, 169a-171a; *Prudential II*, App.201a-203a, 212a, 215a, 219a; *Prudential IV*, App.255a-305a). Hence, there is no federal question; nor, for that matter, much else of an issue.

At most, Petitioner's argument seeks to foster the same contrived and implausible interpretation of a select, express provision of the Plan, which argument the Second Circuit held to be "frivolous" (A.23a).[7]

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[7] We also note that the Petition does not involve a final judgment. *See*, *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) ("Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied"); *Virginia*

(Cont'd)

II. PETITIONER'S ARGUMENT IS MISLEADING AS IT MISSTATES AND OMITS CRITICAL FACTS

In an egregious misrepresentation of the facts, Petitioner misstates and omits critical facts regarding this dispute and the prior binding holdings, going as far back as 1992. Those holdings — and especially those pertaining to the fact that there is no claim of unpaid premiums or assessments for 37 of the 41 policy years, and that due to lengthy periods of the claimants' asbestos exposure, the PLI Trustee can seek coverage under any of the fully paid policies — undermine, if not totally dispose of Petitioner's premium offset claim.

A. There is No Claim of Set-Off for 37 of 41 Years of Insurance Coverage

Petitioner's statement that its "setoff was stipulated to be $1,270,980" in the 1992 Bankruptcy Court decision (*Prudential I*) (Pet.7; App.176a) and that that amount "far exceeds the Trust's present Available Cash" (Pet.7) is misleading. In fact, based on that 1992 decision, the Second Circuit Opinion points out that *the claimed setoff for unpaid premiums relates to* ***only four of the 41*** *years of insurance coverage at issue* (*i.e.*, 1979, 1983, 1984 and 1984; A.15a). For the other 37 years, the premiums were fully paid and thus there is no right of setoff (App.14a-15a). Previously, in the 1992 *Prudential I*

(Cont'd)

Military Institute v. U.S., 508 U.S. 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction").

decision, the Bankruptcy Court held that each year's policy was separate and distinct, including premiums, assessments, setoffs and deductibles:

> The insurance policies American Club [Petitioner] issued to PLI were separate and distinct contracts. No policy language conditions indemnification on the payment of premiums and assessments due under different policies. Each policy contained its own period of coverage, deductible, and policy limit.

(App.172a-173a). The Bankruptcy Court thus found that "[e]xcept for the four policies for which premiums were not paid, PLI satisfied all terms and conditions contained in the agreements" (App.167a).[8] Further, since the period of the claimants' asbestos exposure typically occurred over a number of years, the 1992 Bankruptcy Court also held that:

> Trustee is therefore free to choose among the paid policies for ultimate indemnification of asbestos claims according to his determination of which policies benefit the estate. Trustee need not assume the unpaid policies to receive the benefits owing from triggered P&I policies.

---

[8] The Bankruptcy Court held that other than 1979, 1983, 1984 and 1985, "[i]n all other years in which PLI was a participant in American Club [Petitioner], PLI paid all premiums and assessments" (App.129a).

(App.173a). In the 1998 *Prudential IV* Opinion, the Second Circuit agreed that the Trustee could choose any year for coverage and that only one single deductible would apply (App.294a, 296a). Also, in adopting the foregoing holdings, the 2008 Second Circuit Opinion observed that that "aspect of the bankruptcy court's decision was not appealed" and thus established the *law of the case* (App.21a).

Accordingly, while the 1992 Bankruptcy Court decision allowed for the setoffs to be applied to all claims (App.173a), the Second Circuit rightly held that Petitioner could not parlay four unpaid policy years as a defense against the other 37 fully paid years:

> It seems most reasonable to interpret the ambiguous (or incomplete) provision of the setoff order as intending, consistent with the Bankruptcy Plan, to allow the setoff of the Unpaid Premiums against all policy years prorated among all Claimants, and *not to interpret it as an absolution, parlaying the Insurer's immunity as to four unpaid policy years into an immunity also covering thirty-seven fully paid years.*

(App.17a; emphasis added).

B. Even for the Four Years at Issue, Petitioner Failed to Cancel Those Policies

In *Prudential I*, the Bankruptcy Court also found that for the four unpaid policy years, Petitioner never exercised its purported contractual right to cancel

coverage. The court concluded: "We therefore must assume, under summary judgment standards, that the 1979, 1983, 1984 and 1985 policies may be revived by payment of the past due premiums and assessments . . ." (App.172a).

III. THE SECOND CIRCUIT OPINION PROPERLY CONSTRUES THE PLAN PROVISION AT ISSUE

The thrust of the issues raised in the Petition involves no more than Petitioner's fanciful but disingenuous arguments over the reading and construction of the Plan's setoff provision. In addition to distorting and twisting the Plan's language, Petitioner omits discussion of other key language in the Plan and its Disclosure Statement.

There can be no dispute that the Plan expressly intends that the total amount of the Club's offsets be divided among all allowed Class 5C claims on a pro rata basis. Section 4.05.07(a)(iv) of the Plan states:

> To the extent there shall be a determination that amounts are due and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI. . .and to the extent possible, each holder of an affected Allowed Insured Claim shall share ratably. . .(a) a claim against the offset or recouped amount and shall receive in distribution therefor an Allowed Claim in Class 5C and (b) a claim in respect of any remaining insurance rights relating to such

> affected Allowed Insured Claims and shall receive in distribution therefor, to the extent recovered, cash from the insurer or Club equal to such holder's ratable share.

(App.77a-78a). The operative words and intent are clear: "To the extent there shall be a determination that amounts are due and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI and to the extent possible, each holder of an affected Allowed Insured Claim shall share ratably. . ." (*id.*)

The meaning of that provision is underscored by the Supplemental Disclosure Statement Accompanying the Second Amended Joint Plan ["Disclosure Statement"], which is not mentioned in the Petition:

> the Modified Plan provides that to the extent amounts are owing from PLI to a Club which the Club can offset or recoup against amounts due to PLI. . .each holder of an affected Allowed Insured Claim will share ratably a Class 5C Claim equal to the offset or recouped amount (as well as a Class 5C Claim equal to the Deductible Claim). As a result, the cash payments that otherwise might be obtained from the American Club in respect of certain Excess Claims may be reduced. *The American Club has to date not agreed to such a procedure.*

(App.119a; emphasis added). In unsuccessfully opposing that provision, Petitioner well understood the import

and meaning. Nevertheless, as Petitioner concedes (Pet.8), once the Plan was confirmed (on August 17, 1990) and no appeal taken, it was bound to the Plan. *See*, 11 U.S.C. §1327; *In re Murphy*, 346 B.R. 79, 82 (Bktrcy Ct., S.D.N.Y. 2006).

Like a contract — *In re Prudential, supra*, 158 F.3rd at 77; *In re Bartleson*, 253 B.R. 75, 78-79 (9th Cir. BAP, 2000); *C.F. Brookside, Ltd. v. Skyview Memorial Lawn Cemetery*, 175 B.R. 324, 329 (9th Cir. BAP 1994); *see also, In re Stratford of Texas, Inc.*, 635 F.2d 365, 368 (5th Cir. 1981) — the Plan "should be construed so as to give force and effect to all of its provisions. . ." *Painewebber Inc. v. Bybyk*, 81 F.3rd 1193, 1199 (2nd Cir. 1996). *See also, National Equipment Rental, Ltd. v. Reagin*, 338 F.2d 759, 762-763 (2nd Cir. 1964); *Weiss v. Weiss*, 52 N.Y.2d 170, 436 N.Y.S.2d 862, 864, 418 N.E.2d 377 (1981); *Trump-Equitable Fifth Avenue Co. v. H.R.H. Construction*, 106 A.D.2d 242, 244, 483 N.Y.S.2d 65, 67 (1st Dept. 1985). *See also*, Pet.20-21. Petitioner's arguments, on the other hand, would nullify the purpose and meaning of the pro rata provision.

Petitioner resorts to a baffling argument regarding the provision's language and use of so-called qualifiers (Pet.23-24). There is nothing remarkable or mysterious about those terms. For example, the phrase: ***"to the extent possible***, each holder of an affected Allowed Insured Claim shall share ratably [the Petitioner's offsets]. . ." (App.77a-78a; emphasis added) simply means that to achieve a pro rating of offsets (which total $1,270,980), the total amount of Allowed Insured Claims needs to equal or exceed that amount. Otherwise, if the total of Allowed Insured Claims is less than the total

offsets, it would not be "possible" to satisfy the higher offset amount. As it turned out, not only do the total asbestos claims (which the Second Circuit recognizes "might amount to tens of millions of dollars" App.4a) greatly exceed the Club's total offsets, but the non-asbestos claims alone (*i.e.*, other personal injury claims amount to $1,120,000 and cargo claims $1,610,000) exceed it as well (Cir.Ct.-J.A.32).[9]

The second qualifier found in the phrase "a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefor, ***to the extent recovered***, cash from the insurer or Club equal to such holder's ratable share" (App.78a; emphasis added) deals with the possibility that PLI has other or "remaining insurance" that may pay for some of the claimants' losses. In that event, the language provides that the claimants are entitled to be paid from the "distribution" of that other insurance "an amount equal to such holder's ratable share" . . . "***to the extent recovered***." That qualifier kicks-in if the remaining insurance distribution amounts to less than the claimant's ratable share. As it turns out, there is no other insurance. *Petitioner is it!*

IV. THERE IS NO CONFLICT WITH 11 U.S.C. §553

Although not previously argued in the Second Circuit, Petitioner now attempts to conjure up a federal argument, such as by citing to 11 U.S.C. §553 (Pet.2,

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[9] Petitioner's suggestion that it merely has a "theoretical liability" (Pet.7) is preposterous.

15-19). Nevertheless, there is no issue, nor inconsistency between the Second Circuit Opinion and that statute.

Section 553 and the several cases cited by Petitioner —*e.g.*, *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995); *Studley v. Boylston Nat. Bank*, 229 U.S. 523 (1913) and *Matter of Liquidation of Midland Insurance Co.*, 79 N.Y.2d 253, 590 N.E.2d 1186, 582 N.Y.S.2d 58 (1992)—simply stand for the proposition that a creditor owing a debt to the bankrupt is entitled to a dollar-for-dollar offset for a mutual debt owed by the bankrupt. Here, the Plan does exactly that. It provides that the Club will receive a full offset for the unpaid premiums. That the Plan provides for the offset being shared ratably among the 5C Claimants is not inconsistent with Section 553. By its new fangled argument, however, Petitioner is seeking to go way beyond Section 553, and use it as a shield to prevent itself from having to pay the PLI Trust insurance benefits that will greatly exceed the total offset amount. That is not what the statute says.

To illustrate, we here set forth two possible scenarios. In scenario 1, let's assume that the total liability for all claims is a mere $1,000,000. In such case, since the total offset ($1,270,980) exceeds that amount, Petitioner will pay nothing. However, in a more likely scenario, let's assume that the total for all claims adds up to $20,000,000. In that case, Petitioner's total liability will be reduced by the offset amount, so that its total liability (before subtracting deductibles) is $18,729,020. That the offset is apportioned ratably among the various 5C Claimants is of no consequence to the result.

Whatever the case, however, as the Second Circuit reasoned, Petitioner's attempt to parlay its relatively small offset for unpaid premiums based on only four yearly policies as a shield against any liability for a total of 41 years (of which 37 have been fully paid) is illogical and unsupported by any legal authority.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the Petition be denied.

Respectfully submitted,

SANFORD F. YOUNG
Counsel of Record
LAW OFFICES OF SANFORD F. YOUNG, P.C.
225 Broadway
New York, New York 10007
(212) 227-9755

ALAN KELLMAN
THE MARITIME ASBESTOSIS LEGAL CLINIC,
A DIVISION OF THE JAQUES ADMIRALTY
LAW FIRM, P.C.
645 Griswold, Suite 1570
Detroit, Michigan 48226-4116

Attorneys for Respondents
Asbestosis Claimants

(3)

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IN THE

Supreme Court of the United States

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC.,

Petitioner,

—v.—

ASBESTOSIS CLAIMANTS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

RICHARD H. BROWN, JR.
Counsel of Record

Of Counsel to
NOURSE & BOWLES, LLP
One Exchange Plaza
55 Broadway
New York, New York 10006
(212) 952-6200

Attorneys for Petitioner American Steamship Owners Mutual Protection and Indemnity Association, Inc.

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POINT I

THERE ARE COMPELLING REASONS TO GRANT CERTIORARI

Contrary to Respondents' points a–c, page i, under their heading "Questions Presented" and elsewhere in their Brief, there are ample, indeed compelling, reasons to grant certiorari. As shown in the Petition, the Second Circuit's erroneous decision on application of setoff clearly conflicts with this Court's decisions, and that decision was chiefly grounded on Second Circuit's egregious actions departing from the accepted and usual course of judicial proceedings by first misstating what the relevant Plan subsection "authorized" and then effectively altering the subsection's words and meaning so as to lend apparent support to its misstatement. The aforesaid conflict is self-evident, and those actions (which departed far from the accepted and usual course of judicial proceedings) call for the exercise of this Court's supervisory power, perhaps especially in the bankruptcy setting, this Court having previously expressly referred to "its supervisory power over courts of bankruptcy", *Maggio v. Zeitz*, 333 U.S. 56, 59 (1948).

That state law is also involved is no bar to certiorari as this Court has often granted it in such cases.

The proper way of interpreting bankruptcy plans in judicial proceedings and the consistent application of setoffs in bankruptcy are serious matters not limited to this particular case and in those respects this case is not merely *sui generis*. Moreover, this Petition is specifically addressed to this Court in view of the Second Circuit's clear departure from

the accepted and usual course of judicial proceedings as set out in Point II of the Petition. This Court has well said, albeit in a case involving quite different circumstances, *New York Central Railroad Co. v. Johnson*, 279 U.S. 310, 318 (1929):

> . . . a trial in court is never, as respondents in their brief argue this one was, "purely a private controversy . . . of no importance to the public." The state, whose interest it is the duty of court and counsel to uphold, is concerned that every litigation be fairly and impartially conducted . . .

Petitioner respectfully submits that, at least, the Second Circuit's manner of "interpreting" the key Plan provision, as described in Point II of the Petition and below, was certainly not fair conduct of the litigation, and the circumstances unfortunately suggest it might not have been impartial.

Moreover, contrary to Respondents' point d, page i, the Second Circuit did not "enforce[ ] Plan provisions", but effectively, at Respondents' instance, improperly invented a new and different Plan provision which Second Circuit would wrongly enforce.

If this Court denies this Petition, the Second Circuit and other courts may be more disposed to ignore decisions of this Court or to rewrite bankruptcy plans (and other contracts) to improperly achieve a result they subjectively deem more equitable than enforcing the actual plan and other contractual provisions, as clearly occurred in this case.

Finally, Respondents (Brief 13-14, n.7) note two cases where certiorari was denied, *Brotherhood of Locomotive Firemen and Engineermen v. Bangor*

& Aroostook R. Co., 389 U.S. 327, 328 (1967) and *Virginia Military Institute v. U.S.*, 508 U.S. 946 (1993). However, they fail to point out that those cases were remanded simply to resolve ancillary issues and on that ground were not yet ripe for review. The situation here is altogether different: the Second Circuit's remand is solely for further proceedings in accordance with its opinion, i.e., determination of the values of a multitude of claims and payment thereof. Such a judicial enterprise would be very time-consuming for the courts and expensive for the parties concerned and futile if Second Circuit has erred, as Petitioner contends it clearly has. In that case, as Respondents recognize (Brief 21), Petitioner would not have been obligated to pay anything, and the vast judicial exercise of determining the amounts of thousands of claims, payments, and reimbursements would have been wasted. This also raises the specter of the practical impossibility of recovering actual payments from so many claimants, if at a later date certiorari is sought and granted and Petitioner's contentions are held to be correct.

Accordingly, the crucial importance in this matter of the issues raised by this Petition and the potential consequences if the Petition should be denied strongly support granting certiorari now and finally resolving these issues in light of the potential consequences referred to above.

POINT II

IN THIS MATTER CONCERNING THE BANKRUPTCY PLAN AND THE TERMS OF PETITIONER'S INDEMNITY INSURANCE POLICY, ESSENTIALLY INVOLVING CONTRACTUAL ISSUES, RESPONDENTS (AS DID THE SECOND CIRCUIT) FAIL TO CONSIDER THE TRUE WORDS AND MEANING OF THE KEY PLAN PROVISION CONCERNING THE CONSEQUENCES AMONG CLAIMANTS OF PETITIONER'S OFFSET AMOUNT, I.E., PRORATION AMONG CLAIMANTS OF A CLAIM AGAINST THE OFFSET AMOUNT. THE PROVISION HAS NOTHING TO DO WITH APPLICATION OF THE SETOFF BETWEEN PETITIONER AND THE TRUST, AND PETITIONER SHOULD HAVE BEEN HELD ENTITLED TO PAY NOTHING TO THE TRUST UNTIL PETITIONER HAD FULLY EXERCISED ITS SETOFF IN ACCORDANCE WITH LONG-ESTABLISHED LAW EXPLICITLY APPROVED BY THIS COURT

The Second Circuit's Opinion and Respondents' Brief in this matter have a number of things in common, but the most significant (and disturbing) is that neither quotes accurately or analyzes straightforwardly the actual material words in the pivotal subsection of the Plan concerning the consequences of the Club's setoff on claimants, § 4.05.07(a)(iv), which was the starting point for the Second Circuit's misconceived method of applying Petitioner's setoff right. Second Circuit's fundamental "mistake" was stating wrongly what the subsection "authorized",

without quoting its actual relevant words (an improper procedure). But perhaps its true intent is better revealed near the end of its opinion where Second Circuit purportedly "quoted" the subsection, but actually changed it, disguising its true meaning and making it appear to be consistent with what Second Circuit had wrongly stated the subsection "authorized". (22a–23a, n. 6) Second Circuit then dismissed Petitioner's argument with a flash of *faux* indignation as "frivolous". (23a)

In the Petition, we analyzed in detail the language and meaning of that subsection's material words and described how Second Circuit misstated what it "authorized" and thereafter, by omission and misleading bracketed addition, effectively changed the language so as to disguise the true words and wrongly indicate that its misstated "authorizing" was correct. (Petition, 20–27) We shall not repeat that analysis here. Significantly, Respondents make no effort to analyze and refute what we wrote and, as did the Second Circuit, Respondents never quote accurately or fully the material words in § 4.05.07(a)(iv).

The failure of Second Circuit and Respondents to accurately quote the full actual material language of the subsection and their use of erroneous quotation(s) make it extraordinarily difficult, indeed impossible, to determine precisely what language either "interpreted". This highlights the fundamental flaw caused by the Second Circuit's departure from the accepted and usual course of judicial proceedings.

POINT III

INSTEAD OF ENGAGING THE CONTRACTUAL ISSUES DIRECTLY AND FORTHRIGHTLY, RESPONDENTS' BRIEF RESORTS TO DISTORTIONS, INCOMPLETE QUOTATIONS, HALF-TRUTHS, IRRELEVANCIES, CONCLUSORY ASSERTIONS, AND APPEALS TO EMOTION WHICH CONFUSE AND OBSCURE RATHER THAN ENLIGHTEN

Respondents' Brief is devoted to irrelevancies, half truths, appeals to emotion and their own distortions, the more critical of which we discuss below.

1. Respondent's Deliberate Distortion of § 4.05.07(a)(iv)

The pivotal Plan provision which Second Circuit essentially rewrote in arriving at its improper method of applying setoff is § 4.05.07(a)(iv), which actually states in material part:

> . . . To the extent there shall be a determination that amounts are due and owing from PLI to a Club or insurer which the Club or insurer may offset or recoup against amounts due to PLI, Reorganized PLI, the PLI Disbursement Trust or any claimant in respect of Excess Claims (and to the extent such amounts are not otherwise offset pursuant to § 4.05.07(a)(i) of the Plan or otherwise), and *to the extent possible*, each holder of an affected Allowed Insured Claim *shall share ratably* (with all other holders of affected Allowed Insured Claims *based on the allowed amount of each such Insured Claim*) (a) *a claim against the offset or recouped*

> *amount* and shall receive in distribution therefor an Allowed Claim in Class 5C and (b) a claim in respect of any remaining insurance rights relating to such affected Allowed Insured Claims and shall receive in distribution therefor, *to the extent recovered*, cash from the insurer or Club equal to such holder's ratable share.

Plan, § 4.05.07(a)(iv), App. F, 77a–78a (emphasis added).

However, for example, Respondents (Brief 2) assert that the subsection provides that "each holder of an affected Allowed Insured Claim shall share [offsets] ratably (with all other holders of affected Allowed Insured Claims . . .)". When compared with the actual provision, it is clear that Respondents have improperly inserted "[offsets]" where nothing exists and omitted the words in parentheses following "claims" in the actual provision (which we have italicized *supra*), thereby conveying the false impression that what are to be shared ratably are multiple "offsets", when in fact what is to be shared ratably is "a claim against the offset or recouped amount", obviously meaning a *single* claim against the *single* total *previously* offset or recouped amount. Also, Respondents omit the concluding words in parentheses, "based on the allowed amount of each such Insured Claim", which make the true meaning doubly clear. Respondents' reprehensible change and omission, although not identical, are somewhat similar to Second Circuit's misquotation. (22a–23a, n. 6)

Similarly, Respondents, in quoting § 4.05.07(a)(iv):

(a) at Brief 9, after "ratably", omit the parenthetical phrase "(with all other holders of affected Allowed Insured Claims based on the allowed amount of each such Insured Claim)", which makes

it very clear that the ratable amount can only be calculated after the allowable values of all claims have been determined (Petition 24), which excludes piecemeal "estimates" of the offset, as Second Circuit's decision would wrongly require;

(b) at Brief 17, make the same omission as in (a) above, with the same effect;

(c) at Brief 19, after "ratably", wrongly insert "[the Petitioner's offsets]" rather than the actual language, ". . . a claim against the offset . . . amount . . . ," thereby falsely suggesting that the offsets (plural) are to be shared, possibly while being exercised, or even before, but in any case piecemeal–rather than sharing only a single claim against the single offset amount, as the subsection plainly requires.

2. Respondents Deliberately Misstate Petitioner's Position Regarding § 4.05.07(a)(iv)

Respondents (Brief 17-19) quote a portion of the Supplemental Disclosure Statement ("Statement") (119a) and wrongly assert (Brief 18-19), that "Petitioner well understood the import and meaning," apparently referring to Respondents' (and Second Circuit's) new, improper interpretation of § 4.05.07(a)(iv). Respondents are incorrect. They also ignore material provisions of the Statement immediately preceding their partial quotation which further demonstrate the falsity of Respondents' obscure argument, as well as we can understand it.

The Statement at 116a states:

> No assurances can be given that the PLI Disbursement Trustee will be able to preserve insurance rights and to obtain cash payments in

respect of Excess claims from Clubs or other insurers. The provisions in the Modified Plan concerning Insured Claims have not been agreed upon by any Clubs.

At 118a, the Statement also states:

The extent of the American Club's Claim may be disputed and it may, in turn, owe PLI certain amounts in refunds of premiums and for reimbursement of certain losses incurred by PLI before the Effective Date . . . Under the Modified Plan, in order to try to preserve insurance coverage, the PLI Disbursement Trust will be authorized (to the extent permitted under applicable law) to setoff such amounts owed to PLI against the American Club's Claim. *Nevertheless, it is possible that, after adjustment of the various amounts owing, the American Club may have a substantial net Claim against PLI, and the American Club has taken the position that until any net amount owed to it by PLI is satisfied it will not make cash payments in respect of any Claims*[1], [2]. (Emphasis added)

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[1] The qualifiers to the Plan in § 4.05.07(a)(iv) "to the extent possible" and "to the extent recovered" along with the qualifiers in other Plan sections clearly (a) reflect an uncertainty of result and (b) preserve the American Club's defenses, as expressly held by the bankruptcy court. (App. C, 49a) This uncertainty is outlined in the Supplemental Disclosure Statement, Appendix G, particularly at 112a–122a., as well as throughout the Plan, Appendix F.

[2] Further, as Respondents concede (Brief 10) the amount of Petitioners' setoff was not finally determined until 1992, two years after the Plan was confirmed. (App. H, 176a)

There can be no doubt of Petitioner's position—the Plan *does not* authorize or require proration of its setoff on a piecemeal basis while being applied as Respondents wrongly argue and Second Circuit has wrongly held, and Petitioner, as shown above, made clear that it would not agree to do so, and of course still maintains that position.

In any case, the language in the Statement is substantially the same as in the Plan itself. The Statement says, ". . . each holder of an affected Allowed Insured Claim will share ratably a Class 5C Claim equal to the offset or recouped amount . . .". In a shorthand way, the Statement telescopes down the Plan's language and substitutes the Plan's somewhat arcane usage of "against" by "equal to", with the same result. Significantly, the "ratable sharing" in both the Plan and the Statement is in respect of "the offset . . . amount", confirming (a) that the proration applies to the single (total) amount already offset and (b) that § 4.05.07(a)(iv) has nothing to do with the manner of applying Petitioner's setoff right against the Trust.

As Respondents' (and Second Circuit) have clearly erroneously "interpreted" § 4.05.07(a)(iv), there is no basis for their unwarranted assertions that Petitioner should have appealed the Order confirming the Plan.

3. Respondents' (and Second Circuit's) Accusations that Petitioner Has "Dragged Out" the Matter Are Meritless

At Brief 5, fn 3, Respondent asserts that Petitioner has "dragged out" the matter, allegedly for improper purposes. This is a false argument. The Plan was approved in 1990 and Respondents delayed for four-

teen years, until 2004, to assert their new and erroneous "interpretation" of § 4.05.07(a)(iv) and submit their motion thereon to the bankruptcy court. Clearly, Respondents "dragged out" the matter, *not* Petitioner.

4. Respondents Make Peripheral Arguments Calculated to Raise Equitable Questions or Appeals to Emotion

(a) Respondents (Brief, 2, 3, 4, 10, 13,14, 16, 22) repeatedly and emotionally refer to the fact that PLI fully paid premiums and assessments for 37 of the 41 years to Petitioner, as though that fact makes any difference in regard to the proper legal exercise of Petitioner's setoff rights. It does not, and no spin by Respondents can change the fact that PLI owes the Petitioner over $1.2 million, which it is entitled to setoff in full before making any payment to the Trust.

For reasons detailed in the Petition (8, 13-19), the bankruptcy court's decision and judgment in 1992 expressly granted the Petitioner an unfettered right to setoff against sums payable to the Trustee under triggered policies. That decision and judgment were correct, were not appealed by the Trust or Respondents, are the law of the case, and are *res judicata* as against the Trust and Respondents. Second Circuit sought to avoid their effect by the shallowest of reasoning and a clear departure from the accepted and usual course of judicial proceedings, including the unjustifiable changes it made in "quoting" § 4.05.07(a)(iv), all as set forth in Point II of the Petition (19–27) and above.

(b) Respondents' counsel go outside the record to argue that PLI "paid millions" in premiums for

annual insurance contacts and that large numbers of seamen assertedly have been diagnosed with asbestos-caused diseases. (Brief, 5) Even if such assertions are true, there is no reason to give them weight in the present contractual dispute on the legal rights and obligations of the parties to the insurance contract and to all of the parties contractually bound by the Plan. Accordingly, such considerations are irrelevant. *See*, *Manufacturers Finance Co. v. McKey*, 294 U.S. 442 (1935) in which this Court said at 448:

> The mere fact that a party is obliged to go into a federal court of equity to enforce an essentially legal right arising upon a contract valid and unassailable under controlling state law does not authorize that court to modify or ignore the terms of the legal obligation upon the claim, or because the court thinks, that these terms are harsh or oppressive or unreasonable. A party may stand upon the terms of a valid contract in a court of equity as he may in a court of law.

Here, Respondents would (and Second Circuit has) clearly breach(ed) that sound principle by modifying or ignoring the actual terms of the Plan.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

RICHARD H. BROWN, JR.
Counsel of Record

Of Counsel to
NOURSE & BOWLES, LLP
One Exchange Plaza
55 Broadway
New York, New York 10006
(212) 952-6200

Attorneys for Petitioner
American Steamship Owners
Mutual Protection and
Indemnity Association, Inc.